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Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

SHEILA MARTIN AND WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITION FOR WRIT OF CERTIORARI

RICHARD A. FISHER

THE FISHER LAW FIRM
1510 STUART ROAD
SUITE 210
CLEVELAND, TN 37364
TEL: (423) 479-7009

DAVID G. NIXON
Counsel of Record

THE NIXON LAW FIRM
2340 GREEN ACRES RD.
SUITE 12
FAYETTEVILLE, AR 72703
TEL: (479) 582-0020

Counsel for Petitioners

29 pp

QUESTIONS PRESENTED

Does due process require the adoption and use of objective standards to gauge whether a trial court abused its discretion in approving a proposed class action settlement agreement?

PARTIES TO THE PROCEEDING

Petitioners

Petitioners are Teresa Ballard, Kenisha Bryant, Richard Lynn and Cheryl King, individual citizens of the United States. Ms. Ballard and Ms. King reside in the State of Arkansas and Ms. Bryant resided there at the time this litigation commenced. The Petitioners have no corporate affiliations. The Petitioners were objecting class members in the Circuit Court of Craighead County, Arkansas and the Appellants before the Arkansas Supreme Court.

Respondents

Sheila Martin and Jimmie Lou Spencer are individual citizens of the United States, residing in the State of Arkansas. Ms. Martin and Ms. Spencer were the designated class representatives in the Circuit Court of Craighead County, Arkansas and Appellees before the Arkansas Supreme Court.

Westark Financial Consultants of Jonesboro, Inc., Westark Financial Consultants of Little Rock, Inc., Westark Financial Consultants of North Little Rock, Inc.; Westark Financial Consultants of Jacksonville, Inc.; Westark Financial Consultants of Pine Bluff, Inc.; Westark Financial Consultants of Rogers, Inc.; Westark Financial Consultants of Springdale, Inc.; Westark Financial Consultants of Russellville, Inc.; Westark Financial Consultants of Fayetteville, Inc.; Westark Financial Consultants, Inc.; Cash Advance of Benton, Inc.; Cash Advance of North Little Rock, Inc.; Cash Advance of Little Rock, Inc.; Executive Cash Advance of Little Rock, Inc.; C & B Enterprises, Inc., H&S Enterprises of Rogers, Inc.; H&S Enterprises of Fayetteville, Inc.; H&S Enterprises of Springdale, Inc.; and Payday Advance of Fort Smith, Inc. (collectively, "Westark") are all Arkansas corporations. Westark was the defendant in the

Circuit Court of Craighead County, Arkansas and an appellee before the Arkansas Supreme Court.

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Petitioners respectfully petition for a Writ of Certiorari to review the judgment of the Arkansas Supreme Court in this case.

OPINIONS BELOW

The original opinion of the Arkansas Supreme Court (App. A at 1a) is reported at 349 Ark. 564, 79 S.W.3d 838 (2002). The opinion of the Circuit Court of Craighead County, Arkansas approving the proposed Settlement Agreement over the objection of the Petitioners (App. B at 23a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the Arkansas Supreme Court was entered July 5, 2002.

The jurisdiction of this court is invoked pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the following statutory provisions:

1. U. S. Const., Amend. V.

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall

private property be taken for public use, without just compensation.

2. U. S. Const., Amend. XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Ark. Const., Art. 19, § 13.

§ 13 Maximum lawful rates of interest.

(a) General Loans:

(i) The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.

(ii) All such contracts having a rate of interest in excess of the maximum lawful rate shall be void as to the unpaid interest. A person who has paid interest in excess of the maximum lawful rate may recover, within the time provided by law, twice the amount of interest paid. It is unlawful for any person to knowingly charge a rate of interest in excess of the maximum lawful rate in effect at the time of the contract, and any person who does so shall be subject to such punishment as may be provided by law.

(b) Consumer Loans and Credit Sales: All contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent (17%) per annum shall be void as to principal and interest and the General Assembly shall prohibit the same by law.

(c) Definitions: As used herein, the term:

(i) "Consumer Loans and Credit Sales" means credit extended to a natural person in which the money, property, or service which is the subject of the transaction is primarily for personal, family or household purposes.

(ii) "Federal Reserve Discount Rate" means the Federal Reserve Discount Rate on ninety-day commercial paper in effect in the Federal Reserve Bank in the Federal Reserve District in which Arkansas is located.

(d) Miscellaneous:

(i) The rate of interest for contracts in which no rate of interest is agreed upon shall be six percent (6%) per annum.

(ii) The provisions hereof are not intended and shall not be deemed to supersede or otherwise invalidate any provisions of federal law applicable to loans or interest rates including loans secured by residential real property.

(iii) The provisions hereof revoke all provisions of State law which establish the maximum rate of interest chargeable in the State or which are otherwise inconsistent herewith.

4. Ark. R. Civ. P. 23.

RULE 23. CLASS ACTIONS

(a) Prerequisites to Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this section may be conditional and it may be altered or amended before the decision on the merits.

(c) Notice. In any class action in which monetary relief is sought, including actions for damages and restitution, the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall: (1) describe the action and the members' rights in it; (2) advise each member that the court will exclude the member from the class if the member so requests by a specified date; (3) advise each member that the judgment, whether favorable or not, will include all members who do not request exclusion; and (4) state that any member who

does not request exclusion may, if the member desires, participate in the litigation, either in person or through counsel. The cost of such notice shall be borne by the representative parties; provided, however, that the court may shift all or part of such cost to the opposing party or parties if the case is settled or the class representative substantially prevails on the merits.

(d) Orders in Conduct of Actions. In the conduct of actions to which this rule applies, the court may make appropriate orders: (1) determining the course of proceedings or prescribing measures to prevent undue repetition or complication in the presentation of evidence or argument; (2) requiring, for the protection of the members of the class or otherwise for the fair conduct of the action, that notice be given in such manner as the court may direct to some or all of the members of any step in the action, or of the proposed extent of the judgment, or of the opportunity of the members to signify whether they consider the representation fair and adequate, to intervene and present claims or defenses, or otherwise come into the action; (3) imposing conditions on the representative parties or on intervenors; (4) requiring that the pleadings be amended to eliminate therefrom allegations as to representation of absent persons, and that the action proceed accordingly; and (5) dealing with similar procedural matters. The orders may be combined with an order under Rule 16 and may be altered or amended from time to time as may be desirable.

(e) Dismissal or Compromise. A class action shall not be dismissed or compromised without the approval of the court. In cases where the court has entered an order that an action shall be maintained as a class action, notice of such proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs.

STATEMENT OF THE CASE

This appeal arises from an order of the Circuit Court for Craighead County, Arkansas, the Hon. David N. Laser, approving, over Petitioners' objection, a proposed class action Settlement Agreement. (App. B at 23a.)

The case began on December 8, 2000 as a suit by Ms. Martin and Ms. Spencer (collectively, the "Plaintiffs") against Westark Financial Consultants of Jonesboro, Inc. for usury in the practice of payday lending. On April 26, 2001, all of the other corporate defendants were added as defendants (collectively referred to herein as "Westark"). On April 27, 2001, the Plaintiffs and Westark submitted their "Joint Motion to Certify Class, Approve Settlement of Class Action, Direct Notice of Pendency and Settlement, and Set Date for Hearing on Final Approval of Settlement of Class Action." (App. D at 34a.) Attached to the Joint Motion as Exhibits were the Settlement Agreement (App. D at 39a), the Notice to class members of certification and settlement (App. D at 45a), and the Claim Form to be used by class members (App. D at 55a). The proposed Settlement Agreement settled all claims that were brought or could have been brought against Westark, its owners and sureties in exchange for a payment of $170.000.00 in class counsel fees and $435,000.00 used to purchase "Series E" U. S. Savings Bonds. Westark would continue in business for 90 days after approval of the settlement and would continue to collect on checks thereafter if a payment plan was in effect as to that check.

On April 30, 2001, the trial court certified the case as a class action, and ordered that simultaneous notice of certification and settlement be given by U. S. Standard Mail on or before May 14, 2001. The Petitioners timely objected to the proposed Settlement Agreement as being inadequate, unreasonable, and unjust. An evidentiary hearing was held in the trial court on June 1, 2001. At that hearing, Ms. Martin testified in support of the fairness of the Settlement Agreement and the Plaintiffs rested. Westark offered no evidence in support of the Settlement Agreement.

Petitioners called Westark's chief financial officer as a witness pursuant to a subpoena and elicited evidence regarding the financial condition of Westark, its shareholders and sureties. That evidence showed that: Westark's only substantial activity was payday lending; that Westark had a combined net worth of approximately $ 2.7 million; that Westark would collect approximately $ 1.4 million during the 90-day post-approval period; that Westark's shareholders had taken some $ 3-5 million in profits out of the corporations during their existence; and that Westark had surety bonds totaling $ 1.95 million to cover, *inter alia*, violations of "any other applicable laws of the State [sic]Arkansas."

Petitioners argued that the amount offered to the class was inadequate and unfair and that the owners and sureties should not be released from potential liability without some contribution on their part to the settlement fund. In addition, Petitioners objected to the Notice's less-than-two-week timing and its content.

On August 7, 2001, the trial court approved the Settlement Agreement. On August 28, 2001, the Petitioners timely appealed that order. On July 5, 2002, the Arkansas Supreme Court upheld the decision of the trial court. The Arkansas Supreme Court was asked to adopt - for the first time - standards by which to judge proposed class action settlements. Petitioners allege the Arkansas Supreme Court nominally adopted such standards, but has substantively ignored them, resulting in a denial of due process in this particular case and the promise of continued denials of due process in the procedural vacuum inherent in its decision.

The Petitioners raised the federal question of due regarding the standards applicable to review of proposed class action settlement agreements and Notices as indicated below:

> When determining whether a proposed settlement agreement should be approved, the burden is on the

proponents of the agreement to show that it is fair, reasonable, and adequate. *In re General Motors Corp. Pick-Up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3rd Cir. 1995). The burden is not on the objectors to prove it is unacceptable. This makes sense since it is *the proponents* who allegedly possess all of the facts underlying the negotiations and who stand to benefit from the agreement. Moreover, since the proposed settlement is intended to have *res judicata* effect as to the absent class members and class counsel bears a duty toward the class, it is only right that class counsel be called upon to demonstrate that the proposed settlement was the subject of vigorous and independent negotiation on behalf of the class. Due process requires nothing less. This Court has previously held that due process considerations are relevant in the class action context. *See*, e.g., *Kemp-Bradford VFW Post 4764 v. Wood*, 262 Ark. 168, 554 S.W.2d 344 (1977) ("We do not believe the rights of the members of any class, whether alcoholic beverages are involved or not, should ever be determined without reasonable notice or without evidence that parties are adequately representative of the class."); *Ford Motor Credit Co. v. Rogers*, 285 Ark. 64, 685 S.W.2d 145 (1985)."

Ballard Appellants' Opening Brief. See Ballard, et al., v. Martin, et al., SC 01-1185 (Ark.). (Emphasis added.)

4. That the Official Notice from the Court and the Notice and Summary from the parties contain no reference whatsoever that: (1) a class member may object at all; (2) "the manner by which a notice of objection should be prepared, filed and delivered;" or (3) the manner and time at which objections to the proposed Settlement Agreement shall be heard.

5. That Kenisha Bryant, Cheryl King, Richard Lynn and Crystal Luebbers object to approval of the proposed Settlement Agreement on the grounds,

inter alia, it is woefully inadequate, unfair and unjust to the class members."

Objection of Proposed Intervenors, Teresa Ballard, et al., to Proposed Settlement Agreement, CIV 2000-669(L) (Craighead Co., Ark.).

REASONS FOR GRANTING THE PETITION

I. The Question Presented is Important.

A. The Arkansas Supreme Court's Decision Results in a Denial of Due Process.

Prior to this decision by the Arkansas Supreme Court, there were no enunciated opinions in Arkansas to guide litigants and trial courts in evaluating proposed class action settlement agreements. In line with its stated policy to follow federal law in the area of class action practice (*Fraley v. Williams Ford Tractor and Equipment Company,* 339 Ark. 322, 336, 5 S.W.3d 423, 432 (1999)), the court was asked to adopt *Grunin v. Int'l House of Pancakes,* 513 F.2d 114 (8th Cir. 1975) as the law of Arkansas in this area.

The Arkansas Supreme Court, in a published opinion, did nominally adopt *Grunin, id.* as controlling, but proceeded to misinterpret and misapply it, resulting in a denial of due process. The future "ripple effect" of this error will deny other objecting class members due process if it is not corrected at the outset.

1. Due Process Requires the Use of Objective Standards Against Which to Measure and Limit a Court's Discretion.

Petitioners believe the review standards set forth in *Grunin* and other similar cases from other federal circuits have as their base the due process clause of the Fifth

Amendment. At the core of this consideration is the due process concern that judicial proceedings to which one is not a party are not generally binding on that person, unless the named party adequately represents the interests of that absent person. This general rule and the exception for representative actions have deep roots in our system of justice.

> With a proper regard for divergent local institutions and interests, cf. *Jackson County v. United States*, 308 U.S. 343, 351, 60 S.Ct. 285, 288, 84 L.Ed. 313, this Court is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it. *Chicago, B. & Q.R. Co. v. Chicago*, 166 U.S. 226, 235, 17 S.Ct. 581, 584, 41 L.Ed. 979

Hansberry v. Lee, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L.Ed. 22, 132 A.L.R. 741 (1940).

> In all cases where exceptions to the general rule are allowed, and a few are permitted to sue and defend on behalf of the many, by representation, care must be taken that persons are brought on the record fairly representing the interest or right involved, so that it may be fully and honestly tried.

Smith v. Swormstedt, 57 U.S. 288, 303, 16 How. 288, 14 L.Ed. 942 (1853). *See also Supreme Tribe of Ben Hur v. Cauble*, 255 U.S. 356, 41 S.Ct. 338, 341 (1921).

Due process, therefore, requires adequate representation of the absent class members' interests. When the nominal parties agree to settle, the court by necessity becomes the representative of the absent parties in its fiduciary role on their behalf.

> The inquiry appropriate under Rule 23(e), on the other hand, protects unnamed class members "from unjust or unfair settlements affecting their rights when the representatives become fainthearted before the action is adjudicated or are able to secure satisfaction of their individual claims by a compromise." See 7B Wright, Miller, & Kane § 1797, at 340-341.

Amchem Products, Inc. v. Windsor, 521 U.S. 591, 623, 117 S.Ct. 2231, 2249 (1997). This statement merely begs the question of whether objective standards – or any standards at all – are required under the due process clause. Petitioners submit objective standards *are* needed in order to assure adequacy of representation by the Court, as fiduciary, when the class representative is advocating settlement. The absence of objective standards makes exercise of that fiduciary duty inherently arbitrary, which results in a denial of due process to the absent class members.

> This expanded role of the court in class actions (relative to conventional bipolar litigation) continues even after certification. While the parties in a normal suit do not ordinarily require a judge's approval to settle the action, class action parties do. Rule 23(e) provides: "A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to all members of the class in such manner as the court directs." Fed.R.Civ.P. 23(e). Courts and commentators have interpreted this rule to require courts to "independently and objectively analyze the evidence and circumstances before it in order to determine whether the settlement is in the best interest of those whose claims will be extinguished." 2 Newberg & Conte § 11.41, at 11-88 to 11-89. "Under Rule 23(e) the district court acts as a fiduciary who must serve as a guardian of the rights of absent class

> members.... [T]he court cannot accept a settlement that the proponents have not shown to be fair, reasonable and adequate." *Grunin v. International House of Pancakes*, 513 F.2d 114, 123 (8th Cir.), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975); Malchman *v. Davis*, 706 F.2d 426, 433 (2d Cir.1983); *Sala v. National RR Passenger Corp.*, 721 F.Supp. 80 (E.D.Pa.1989); see also *Piambino v. Bailey*, 610 F.2d 1306 (5th Cir.), *cert. denied*, 449 U.S. 1011, 101 S.Ct. 568, 66 L.Ed.2d 469 (1980).

In re General Motors Corporation Pick-Up Truck Fuel Tank Products Liability Litigation, 55 F.3d 768, 785 (3rd Cir. 1995).

These principles apply to state court proceedings through the Fourteenth Amendment. *Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 680, 50 S.Ct. 451, 454 (Mem), 74 L.Ed. 1107 (1930), *Richardson v. Ramirez*, 418 U.S. 24, 39-40, 94 S.Ct. 2655, 2664, 41 L.Ed.2d 551 (1974); *Hansberry v. Lee, supra, Gideon v. Wainwright*, 372 U.S. 335, 83 S. Ct. 792, 9 L.Ed.2d 799, 93 A.LR.2D 733 (1963). The federal constitutional issues of due process were timely raised by the Petitioners and were ruled upon by the Arkansas Supreme Court, thereby allowing this Court to exercise jurisdiction in this matter. *Orr v. Orr*, 440 U.S. 268, 99 S.Ct. 1102, 59 L.Ed.2d 306 (1979).

In determining what is due process of law, regard must be had to substance, not to form. *Chicago, B. & Q.R. Co. v. City of Chicago*, 166 U.S. 226, 17 S.Ct. 581, 41 L.Ed. 979 (1897).

> For all its consequence, "due process" has never been, and perhaps can never be, precisely defined. "[U]nlike some legal rules," this Court has said, due process "is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895, 81 S.Ct. 1743, 1748, 6 L.Ed.2d 1230. Rather, the phrase expresses the requirement of "fundamental fairness,"

> a requirement whose meaning can be as opaque as its importance is lofty. Applying the Due Process Clause is therefore an uncertain enterprise which must discover what "fundamental fairness" consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake.

Lassiter v. Department of Social Services of Durham County, 452 U.S. 18, 101 S.Ct. 2153, 68 L.Ed.2d 640 (1981).

With these rules in mind, how do the proceedings in Arkansas square with them? First, the Arkansas Supreme Court explicitly stated it was adopting the reasoning of *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). The evidence presented by the Petitioners showed that the total potential judgment on usury claims alone could have been as high as $ 27 million. The Arkansas Supreme Court recognized Petitioners had made a "bona fide" argument that the $ 605,000.00 offered in settlement was not comparable to the potential recovery, but then stated "...we are not deciding the merits of the usury question in their favor ... [n]or can we proceed in our analysis with <u>any assumption</u> that the class will prevail and collect all damages claimed." (Emphasis added.) *Ballard v. Martin*, 349 Ark. 564, 578, 79 S.W.3d 838, 846-47 (2002). In essence, the Arkansas Supreme Court abdicated its reviewing role, by doing so, discarded this first and most important element of analysis. *Some* assumptions regarding the likelihood of the class prevailing on their admittedly "bona fide" claims was necessary in order to place a value on those claims for purposes of comparison to the settlement offer.

The Arkansas Supreme Court then turned to the second, subsidiary *Grunin* factor - the defendant's ability to pay.[1] Here, the court improperly balanced the evidence elicited by

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[1] The Arkansas Supreme Court discussed this issue in the context of the first factor, as well, but that discussion will be addressed by Petitioners exclusively under the second ability-to-pay factor.

Petitioners in the record against Westark's disputed claims in its pleadings. Petitioners introduced evidence that Westark's ability to pay greatly exceeded the $ 605,000.00 offered while Westark introduced *no evidence whatsoever* that its ability to pay was impaired. In fact, the evidence showed that during the 90-day post-approval operations period, Westark could expect to collect some $ 1.4 million from the class members. The court looked to *In re Milken & Assoc. Securities Litigation*, 150 F.R.D. 46 (S.D.N.Y. 1993) for justification that a settlement that is much smaller than the amount sought in the complaint may be fair and reasonable and then said "a settlement which embraces Series EE Bonds totaling $870,000 and forgiveness of debt after ninety days has considerable value." *Ballard, supra* at 349 Ark. at 580, 79 S.W.3d at 848. Of course, *Milken* and its kind deal with cases where analysis of the first factor show that the value of the class's claims are worth much less than the amount sought and confirm that the ability-to-pay factor is subsidiary to the first factor (value of the claims versus amount offered). Here, the court uses the value of the savings bonds *sixteen years hence* to improperly justify the supremacy of the second factor over the first.

Moreover, the Arkansas Supreme Court *completely ignored* any analysis of the value of other claims that were not brought, but that were being released, as well as the value of claims that could have been brought against Westark's owners and sureties (who were also being released *without* consideration) and their ability to pay.

If the Respondents seek to justify the Settlement Agreement on the basis that there is a limited fund, then this Court's opinion in *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 119 S.Ct. 2295, 144 L.Ed.2d 715 (1999) is instructive. *Ortiz* makes it clear that strict proof that the fund is limited - otherwise than by the settlement agreement itself - is required. *Id.* at 838-42. Failure to meet that burden of proof demonstrates an absence of adequate representation and requires rejection of the proceedings below.

The defect of certification going to the most characteristic feature of a limited fund action was the uncritical adoption by both the District Court and the Court of Appeals of figures [FN omitted] agreed upon by the parties in defining the limits of the fund and demonstrating its inadequacy. [FN omitted] When a district court, as here, certifies for class action settlement only, the moment of certification requires "heightene[d] attention," *Amchem,* 521 U.S., at 620, 117 S.Ct. 2231, to the justifications for binding the class members. This is so because certification of a mandatory settlement class, however provisional technically, effectively concludes the proceeding save for the final fairness hearing. And, as we held in *Amchem,* a fairness hearing under Rule 23(e) is no substitute for rigorous adherence to those provisions of the Rule "designed to protect absentees," *ibid.,* among them subdivision (b)(1)(B). [FN omitted] Thus, in an action such as this the settling parties must present not only their agreement, but evidence on which the district court may ascertain the limit and the insufficiency of the fund, with support in findings of fact following a proceeding in which the evidence is subject to challenge, see *In re Bendectin Products Liability Litigation,* 749 F.2d 300, 306 (C.A.6 1984) ("[T]he district court, as a matter of law, must have a fact-finding inquiry on this question and allow the opponents of class certification to present evidence that a limited fund does not exist"); see also *In re Temple,* 851 F.2d 1269, 1272 (C.A.11 1988) ("Without a finding as to the net worth of the defendant, it is difficult to see how the fact of a limited fund could have been established given that all of [the defendant's] assets are potentially available to suitors"); *In re Dennis Greenman Securities Litigation,* 829 F.2d 1539, 1546 (C.A.11 1987) (discussing factual findings necessary for certification of a limited fund class action).

Ortiz v. Fibreboard Corp., 527 U.S. 815, 848-50, 119 S.Ct. 2295, 2316, 144 L.Ed.2d 715 (1999).

In short, when the Arkansas Supreme Court uncritically adopted the trial court's assessment that Westark had only a limited fund with which to pay claims, without evaluating *at all* the ability of its owners or sureties to pay and the value of released, but unbrought, claims against them, the process was fundamentally flawed. It was the substance of the proceeding, not the nominal adoption of objective standards, that resulted in a denial of due process. Dismissal of non-parties for claims not brought and for no independent consideration deserves a deeper examination and specific findings. *Girsh v. Jepson*, 521 F.2d 153, 159 (3rd Cir. 1975).

2. The Arkansas Supreme Court Improperly Shifted the Burden of Proof to Objecting Class Members.

The Arkansas Supreme Court opinion effectively shifted burden of proof from the Plaintiffs and Westark to the Petitioners. The record was clear that they had utterly failed to meet their burden with admissible proof. They provided *no evidence whatsoever* of: (1) the value of the usury claim by introducing the amount of fees collected from class members during the class period or the number of class members; (2) their ability to pay; (3) the value of other claims being released that could have been, but were not, brought; (4) the value of claims being released as to Westark's owners and sureties that could have been, but were not, brought; or (5) the ability of Westark's owners and sureties to pay.

The court excuses this lack of proof by Respondents by balancing the evidence against Westark's claims in its pleadings:

> Following the filing of the complaint, Martin commenced discovery. Through one set of interrogatories and requests for production

> propounded by Martin, information about the arbitration provisions in the customer contracts was elicited. Martin did request limited information relating to Westark's financial condition. However, it is unclear from the record whether Martin ever received this information.

Ballard, supra at 349 Ark. at 572, 79 S.W.3d at 842. (Emphasis added.)

> The Westark appellees dispute these figures. They also claim that they have little cash on hand and that operating overhead reduces the amount available for the settlement fund. We do not consider the disputed claim that the Westark appellees could have paid more than $605,000 to be a persuasive reason for overturning the settlement.

Ballard, supra at 349 Ark. at 582, 79 S.W.3d at 848-49. (Emphasis added.)

This shifting of the burden of proof to the Petitioners effectively changes the inquiry from one where the proponents of the Settlement Agreement are required to positively prove the its adequacy to one where the objecting class members are required to prove it inadequate. This shift denies them due process in that it puts them at odds with the reviewing court. In other words, the objecting class members are charged with the burden of persuading the very fiduciary - the court - who is supposed to be looking out for their interests and incorrectly requires them to overcome an faulty presumption that the proposed settlement is fair. It should be the Plaintiffs and Westark, in this case, who carry that burden because the Plaintiffs have arguably abandoned their adversarial posture with Westark and no longer adequately represent the class' interests.

3. The Time Period for Notice was Too Brief to Afford Class Members Due Process.

The Respondents were ordered by the trial court to mail notice to class members on or before May 14, 2001. Notice was actually mailed on May 16, 2001 using U. S. Standard Mail. The deadline for a class member to object to the proposed Settlement Agreement was May 29, 2001. The fairness hearing was set for June 1, 2001.

Notice to class members must be reasonably calculated to apprise them of their rights. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 173, 94 S.Ct. 2140, 2150, 40 L.Ed.2d 732 (1974). *See also Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

While notice in this case was mailed to class members, it was mailed using U. S. Standard Mail. That method of mailing excludes forwarding by the Postal Service and means that, if the class member has changed address, the class member will not receive the Notice even if she has left forwarding instructions with the Postal Service. Moreover, given the brief window of time between later mailing of the notices on May 16 and the fairness hearing on June 1, 2001, those notices that required forwarding likely would not have arrived until just before the time to object to the proposed settlement expired, or even later. As to those class members, therefore, they had either no notice whatsoever of the proceedings or an inadequate opportunity to object and present evidence.

The Arkansas Supreme Court recognized those problems and dismissed them as inconsequential. The court said:

> Martin, in her mailing to class members, claims that she requested return service for undeliverable notices at an additional cost. This was for the purpose of forwarding the notice to transient class members, according to Martin. Ballard and Cain reply that nothing regarding remailing returned notices to new

addresses is in the record. But what the record does support is that forwarding addresses were requested by Martin at an added cost which presupposes this was for the purpose of remailing. Though, a forwarded notice may have been too late for the June 1 fairness hearing, it certainly was timely notice of the right to opt out of the class.

Ballard, supra at 349 Ark. at 587-88, 79 S.W.3d at 852-53. (Emphasis added.)

The court apparently considered the presence of an opt-out provision and timely notice of that option alone to be a cure-all for any flaws existing in the notice and settlement agreement approval process. This is wrong. The class must have a reasonable opportunity to develop a record and oppose the proposed settlement and a lack of the best practicable notice to them of that right is a denial of their fundamental right. *Girsh v. Jepson*, 521 F.2d 153 (3rd Cir. 1975). If the settlement is inadequate, and their individual claims are small, what good is an opt-out to a class member?

Furthermore, the Notice is fundamentally flawed because it did not disclose that a class member could object or how or when he could do so. Additionally, the Notice did not disclose that Westark's owners and sureties - who were not defendants -were being released. See, e.g., *Twigg v. Sears, Roebuck & Co.*, 153 F.3d 1222 (11th Cir. 1998).

B. The Impact of this Decision on Future Class Action Cases in Arkansas is Potentially Enormous.

This published opinion will affect all future class actions in Arkansas for which settlement is sought. Given the prospective impact of the published opinion from the Arkansas Supreme Court if this deficiency goes uncorrected, future *ad hoc* denials of due process are assured.

Arbitrary standards amount to no standards at all. Discretion becomes unfettered and leaves parties and courts with nothing to guide them. The due process concerns evident in the instant case will be magnified through time unless this Court exercises corrective action now.

II. This Court Has Never Spoken on this Issue and Guidance is Needed.

As near as can be determined, this Court has never explicitly stated that due process requires adherence to certain objective standards in the exercise of a trial court's discretion in approving a proposed class action settlement. Nor has this Court enumerated what those standards should be. This Court's opinion in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 117 S.Ct. 2231 (1997) comes close in discussing 23(e), but does not categorically state that due process is at stake or that objective standards are there to gauge and limit the discretion of the trial court.

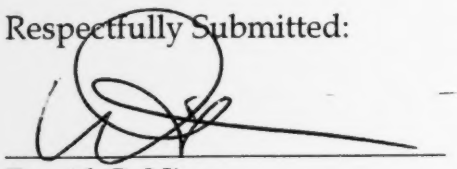
There is some precedent for the role of a trial court in representative actions to construe the standards for approval of settlement agreement as requirements for effective protection of absent claimants. *Protective Committee For Independent Stockholders of TMT Trailer Ferry, Inc. v. Anderson*, 390 U.S. 414, 434-41, 88 S.Ct. 1157, 1168-73 (1968) involved appellate review of settlement agreement reached in a bankruptcy proceeding and discussed at length the appropriate standards required by the reviewing court and the justification for those standards. While not a "class action" *per se*, bankruptcy proceedings are equitable in nature and deal with a representative action that disposes of the rights of absent parties.

If it please the Court, this fundamental and important issue is important enough to warrant clarification.

CONCLUSION

For all of the above reasons, the Petitioners request this Court to grant Certiorari and to reverse and remand the decision of the Arkansas Supreme Court with instructions or guidance as to how to proceed.

Respectfully Submitted:



David G. Nixon
THE NIXON LAW FIRM
2340 Green Acres Road, Ste 12
Fayetteville, AR 72703
Tel: 479-582-0020
Fax: 479-582-0030

Counsel of Record

Richard A. Fisher, Esq.
THE FISHER LAW FIRM
1510 Stuart Road, Ste 210
Cleveland, TN 37364-0191
Tel: 423-479-7009

Attorneys for Petitioners

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APPENDIX

The Appendix is in a separate volume submitted herewith.

Supreme Court, U.S.
FILED
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No. _____

IN THE
Supreme Court of the United States

TERESA BALLARD, ET AL.,
Petitioners,

v.

SHEILA MARTIN, ET AL., AND WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

Appendix to

PETITION FOR WRIT OF CERTIORARI

RICHARD A. FISHER

THE FISHER LAW FIRM
1510 STUART ROAD
SUITE 210
CLEVELAND, TN 37364
TEL: (423) 479-7009

Counsel for Petitioners

DAVID G. NIXON
Counsel of Record

THE NIXON LAW FIRM
2340 GREEN ACRES RD.
SUITE 12
FAYETTEVILLE, AR
72703
TEL: (479) 582-0020

Counsel for Petitioners

51 pp

APPENDIX A

SUPREME COURT OF ARKANSAS

No. 01-1185

TERESA BALLARD, et al., and STEPHEN CAIN, et al., APPELLANTS, VS. SHEILA MARTIN, et al, and WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., et al., APPELLEES,	Opinion Delivered JUL 02 2002 APPEAL FROM THE CRAIGHEAD COUNTY CIRCUIT COURT, NO. CIV 2000-0669 HON. DAVID N. LASER, JUDGE, AFFIRMED

ROBERT L. BROWN, Associate Justice

This is a check-cashing case that presents the issue of whether a class-action settlement was fair and adequate. The appellants are two groups of intervenors, Teresa Ballard *et al.* and Stephen Cain *et al.* (Collectively referred to as Ballard and Cain). The appellees are Sheila Martin and Jimmie Sue Spencer, individually and on behalf of the class (collectively referred to as Martin), who represent the original class of plaintiffs in this litigation, as well as Westark Financial Consultants of Jonesboro, Inc. (Westark), together with eighteen other check-cashing businesses which voluntarily submitted to the jurisdiction of the Craighead County Circuit Court as defendants as part of Martin's amended motion for class certification (collectively referred to as Westark defendants). Westark and the other eighteen check-cashing businesses will be referred to jointly as "Westark appellees."

On appeal, Ballard and Cain challenge the fairness and adequacy of the class settlement between Martin and the

Westark defendants. Ballard and Cain raise three additional points: (1) the adequacy of Martin, and class counsel to represent the interests of the class; (2) whether the trial court adequately enforced subpoenas against the Westark appellees; and (3) whether the notice to potential class members was adequate.

On December 8, 2000, Martin, both individually and on behalf of a class, filed the complaint against Westark in Craighead County Circuit Court. According to the complaint, each potential class member had engaged in deferred-presentment check-cashing with Westark. The typical deferred-presentment transaction allowed the customer to write a check for the cash amount exchanged plus a "service charge," which the check-casher would defer cashing until the customer's "payday." On payday, the customer was instructed to pick up the held check in exchange for cash in the face amount of the check. The customer could defer payment by writing a second check for the amount owed, the original service charge, and the new service charge. Martin alleged that these service charges were interest and that Westark had engaged in usurious lending practices in violation of Arkansas Constitution Article 19, section 13. She sought damages on that basis and alleged that the class met the requirements of Rule 23 of the Arkansas Rules of Civil Procedure. On January 8, 2001, she also moved for class certification.

Following the filing of the complaint, Martin commenced discovery. Through one set of interrogatories and requests for production propounded by Martin, information about the arbitration provisions in the customer contracts was elicited. Martin did request limited information relating to Westark's financial condition. However, it is unclear from the record whether Martin ever received this information. The class was later estimated to include approximately 18,500 members. On April 26, 2001, Martin filed an amended motion for class certification in which the Westark defendants were added as parties defendant. Martin also filed a second amended complaint that same date with the Westark defendants listed as parties defendant.

Sometime in mid-to-late April 2001, Martin and the Westark appellees reached a settlement agreement. On April 30, 2001, the trial court entered an order certifying the class pursuant to Ark. R. Civ. P. 23, adopting the settlement, and requiring notice to the class by publication in the *Arkansas Democrat-Gazette* and by individual notices to be mailed no later than May 14, 2001. In the settlement, the eighteen Westark defendants agreed to submit to the jurisdiction of the Craighead County Circuit Court with Westark for purposes of settling all claims against them. The settlement was as follows: the nineteen check-cashing businesses would deposit $605,000 into a settlement pool. $435,000 of the amount would be used to purchase Series E bonds totaling $870,000 to pay the claims of aggrieved customers at a rate of one and one-half times any fees paid by those customers.[1] Claims exceeding the face amount of the bonds would not be paid. This settlement amount would be subject to set-off for any outstanding balance due the defendant check-casher for cash advanced and unpaid. The settlement amount, if any remained after the set-off, would be paid to the customer in the form of a Series E savings bond. The savings bonds were worth one-half of their face value until their maturity in sixteen years, and the class member was required to wait six months to cash the bond for the initial one-half value. Class counsel for Martin would immediately receive a fee of $170,000.

The settlement agreement further provided that the Westark appellees would continue to operate their businesses for the next ninety days after the date of the settlement in order to collect any outstanding checks. The settlement provided additionally that if any appellate court ruled that the service charges associated with these transactions were not usurious, then the defendants would be free to operate in any

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[1] The appellants assert for the first time on appeal that the United States Treasury discontinued Series E bonds in 1980, and thus the settlement is impossible to perform as written. Martin responds that the class of bonds is now called Series EE instead of Series E, and that this oversight should not be a basis for invalidating the settlement. We agree.

legal manner. The final "opt-out date" for nonparticipation in the class or settlement was fixed at August 15, 201.

After this order was entered, notice was given to the class members together with the conditions of the proposed settlement. Martin accomplished notice by placing an advertisement in the *Arkansas Democrat-Gazette* newspaper on May 21, 2001. Class counsel also mailed an individual notification to each potential class member by standard mail on May 16, 2001.[2]

Two groups of objectors moved to intervene after receiving notice. The Ballard group of objectors involved five members and the Cain group of objectors involved twelve members. The Ballard objectors filed a motion to intervene on May 25, 2001. On that same date, they issued subpoenas for the financial records of the Westark appellees. The Cain objectors filed their motion to intervene on June 1, 2001. The trial court granted both motions to intervene on June 1, 2001, at the beginning of the fairness hearing on the proposed settlement.

At the fairness hearing, the trial court allowed the Martin class as well as the Westark appellees to put on evidence supporting the settlement. The Martin class presented the testimony of Martin herself, as well as the testimony of Chris Lawson, a partner at the law firm of Friday, Eldredge, & Clark in Little Rock. As class representative, Martin testified that she had been kept abreast of the litigation and had approved the settlement.[3] On cross-examination, she admitted to a lack of knowledge about some of the details of the litigation and the settlement agreement. For his part, Lawson testified that he was involved in class actions against check-cashing firms, and that he would advise any clients

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[2] Notice was mailed apparently two days after the May 14, 2001 date specified in the trial court's order. This two-day delay is not an issue on appeal.

[3] The record does not reveal whether Jimmie Sue Spencer, the other class representative, was present at the fairness hearing.

affected by the proposed settlement to remain in the settlement and not opt out.

The Westark defendants presented the testimony of one witness, Jeff Forsey, who testified in his capacity as the chief executive officer of fourteen of the Westark appellees and as custodian of financial documents for all nineteen Westark appellees. Forsey did not bring all of the subpoenaed financial documents with him but did appear in person at the fairness hearing. The Ballard intervenors moved to enforce the subpoenas, and Westark defendants moved to quash them. The trial court ruled that Forsey's personal appearance and his partial production of financial records satisfied the subpoenas, considering how abbreviated the time was that the Westark defendants had to respond to the subpoenas.

On the stand, Forsey testified that the decision to enter into the settlement with the Martin class was a cost/benefit business decision for the Westark appellees. He further testified that the reason that they chose savings bonds as the method of payment was in hope that the settlement would foster "a different perspective on money" among the low-income class members. He added that the businesses he represented at the hearing would have difficulty producing the $605,000 to fund the settlement. On cross-examination, Forsey testified to the financial condition of the Westark appellees. Among other things, he testified that the receipts of the Westark appellees during the ninety-day period after approval of the settlement could exceed the settlement amount of $605,000.

On August 7, 2001, the trial court entered its final order approving the settlement. Ballard and Cain now appeal that order.

I. Fairness of the Settlement

Ballard and Cain first assert that the trial court abused its discretion when it approved the class settlement because the settlement was not fair, reasonable, and adequate. They

urge this court, in measuring the fairness of the settlement, to adopt the Eighth Circuit Court of Appeal's standards set out in *Grunin v. Int'l House of Pancakes*, 513 F. 2d 114 (8th Cir. 1975).

In *Grunin*, the Eighth Circuit adopted four factors to assist in assessing whether a class settlement is fair and adequate. Those four factors are listed below, with the first factor being the primary measure of fairness and the remaining three being secondary to the first:

> (1) the strength of the case for the plaintiffs on the merits, balanced against the amount offered in the settlement;
>
> (2) the defendant's overall financial condition and ability to pay;
>
> (3) the complexity, length, and expense of further litigation; and
>
> (4) the amount of opposition to the settlement.

Grunin, 513 F.2d at 124 (citing *West Virginia v. Chas. Pfizer & Co.*, 440 F.2d 1085 (2d Cir. 1971); *City of Detroit v. Grinnell Corp.*, 495 F.2d 448 (2d Cir. 1974); *Young v. Katz*, 447 F.2d 431 (5th Cir. 1971)).

The Eighth Circuit further stated in *Grunin* that the fairness of a class settlement is a discretionary matter that rests with the trial court, and an appellate court should not reverse a trial court's approval of a class settlement absent an abuse of its discretion. *Grunin*, 513 F.2d at 123 (citing *Ace Heating & Plumbing Co. v. Crane Co.*, 453 F.2d 30 (3d Cir. 1971)). The *Grunin* Court quoted the *Ace Heating* case for the following proposition:

> Such determination is committed to the sound discretion of the trial judge. Great weight is accorded his views because he is exposed to the litigants, and their strategies, positions and proofs. He is aware of the expense and possible

> legal bars to success. Simply stated, he is on the firing line and can evaluate the action accordingly.

Grunin, 513 F.2d at 123 (quoting *Ace Heating*, 453 F.2d at 34). The Eighth Circuit continued that the trial court is accorded deference, but that deference is accompanied by a duty to act as a fiduciary who must serve as guardian of the rights of absent class members. *Grunin*, 513 F.2d at 123 (citing *Greenfield v. Village Indus., Inc.*, 483 F.2d 824 (3d Cir. 1973); *Norman v. McKee*, 431 F.2d 769 (9th Cir. 1970); *Percodani v. Riker-Maxon Corp.*, 50 F.R.D. 473 (S.D.N.Y. 1970), *aff'd sub nom. Farber v. Riker-Maxon Corp.*, 442 F.2d 457 (2d Cir. 1971)). It concluded that no court should accept a settlement that is unfair or inadequate, and the burden is on the proponents of the settlement to show that the proposed settlement meets standards of fairness and adequacy. *Grunin*, 513 F.2d at 123 (citing *City of Detroit v. Grinnell Corp., supra; United Founders Life Ins. Co. v. Consumers Nat'L Life Ins. Co.*, 447 F.2d 647 (7th Cir. 1971); *Young v. Katz, supra*).

We adopt the *Grunin* factors and will proceed to analyze this issue using those factors.

a. The strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement.

Ballard and Cain first argue that the plaintiff class's chance of success on the merits is great. They also point out the many differences between a possible litigation-generated recovery versus the settlement agreement, including differences in financial benefit to class members and differences to the future of the appellees' check cashing businesses. They conclude that the likelihood of success on the merits versus the offered settlement weighs heavily in favor of this court's finding that the trial court abused its discretion.

(i) Strength on the merits.

We observe, as an initial matter, that this court has never directly spoken to the issue of whether the deferred-presentment transactions, such as we have in the instant case, are usurious and violate the Arkansas Constitution. However, many of this court's cases point to the strong constitutional policy against usury established by Article 19, section 13 of the Arkansas Constitution, both before and after the adoption of Amendment 60 in 1982. Article 19, section 13, of the Arkansas Constitution states in relevant part:

> (a) General Loans:
>
> (i) The maximum lawful rate of interest on any contract entered into after the effective date hereof shall not exceed five percent (5%) per annum above the Federal Reserve Discount Rate at the time of the contract.
>
> * * *
>
> (b) Consumer Loans and Credit Sales: All contracts for consumer loans and credit sales having a greater rate of interest than seventeen percent per annum shall be void as to principal and interest and the General Assembly shall prohibit the same.

Ark. Const. Art. 19, § 13. *See also Luebbers v. Money Store, Inc.*, 344 Ark. 232, 40 S.W.3d 745 (2001) (citing this portion of Article 19, section 13, as potentially applicable to the transactions at issue, but not reaching the merits of the usury dispute). Historically, this court has closely scrutinized what appeared to be a non-usurious transaction on its face to reveal the true usurious nature of the transaction. *See Bunn Lumber Co. v. Weyerhaeuser Co.*, 268 Ark. 445, 598 S.W.2d 54 (1980) (finding transaction usurious where interest on account payable was masked as a service charge); *Arkansas Savings & Loan Ass'n v. Mack Trucks of Arkansas, Inc.*, 263 Ark. 264, 566 S.W.2d 128

(1978) (finding transaction usurious where interest on loan was masked as a pre-loan "commitment fee"); *Sosebee v. Boswell*, 242 Ark. 396, 414 S.W.2d 380 (1967) (finding transaction usurious where a forfeiture of money placed in escrow was actually interest, but was masked as liquidated damages, processing fees, and expenses); *Smith v. Eason*, 223 Ark. 747, 268 S.W.2d 389 (1954) (finding transaction usurious where interest on loan was masked as a commission payable to lender's agent); *Strickler v. State Auto Finance Co.*, 220 Ark. 565, 249 S.W.2d 307 (1952) (finding transaction usurious where interest on loan policy was masked a service charge and pro rata share of overhead expenses); *Wilson v. Whitworth*, 197 Ark. 675, 125 S.W.2d 112 (1939) (finding transaction usurious where interest charges were masked as insurance and service fees). We conclude that for decades this court has been willing to delve into the particulars of a financial arrangement to expose its usurious nature. As we said in *Sparks v. Robertson*, 66 Ark. 460, 463-64, 51 S.W. 460, 462 (1899), "The law shells the covering, and extracts the kernel. Names amount to nothing when they fail to designate the facts." As a result, it is obvious that the transactions presented in this case would receive exacting scrutiny if they were presented to this court for a merits determination.

Recently, this court rejected an attempt by the General Assembly to rename deferred-presentment interest as a non-usurious fee under Act 1216 of 1999, then codified at Ark. Code Ann. § 23-52-104(b) (Repl. 2000). *See Luebbers v. The Money Store, Inc., supra;* (holding that the determination of what is interest and what is not interest is for the courts, not the legislature). *See also Strickler v. State Auto Finance Co., supra* (holding statute unconstitutional as violative of separation of powers where General Assembly tried to deem installment loan fees as non-interest). The Westark appellees may have relied on Act 1216 of 1999 in proceeding to do business in this state. The effect of that reliance, if any, is an issue that has not been resolved by the courts of this state.

The Westark apellees argue that their agreements with their customers provide that any customer disputes must be

resolved by arbitration. They note that at the time of the settlement negotiations, only the case of *Showmethemoney Check Cashers, Inc. v. Williams,* 342 Ark. 112, 27 S.W.3d 361 (2000), which held that the arbitration agreements at issue could not be enforced due to lack of mutuality of obligation, had been decided by this court. They further refer to the general release of claims signed by most of their customers as a defense against the class-action litigation. Finally, they advance a practical argument. They underscore the fact that eighteen of the nineteen Westark appellees voluntarily submitted to the venue of the Craighead County Circuit Court in order to take advantage of the terms of the settlement. Those eighteen defendants assert that despite their voluntary appearance, they have preserved an objection to venue in the trial court, should the settlement not be consummated. They further assert that if this settlement is thwarted, they will seek to withdraw from the jurisdiction of the Craighead County Circuit Court. If that happens, any success on the merits will be applicable only to Westark and not to the other eighteen Westark defendants.

The arbitration defense seems less valid today than it might have appeared on April 30, 2001, in light of this court's recent decisions. *See, e.g., The Money Place, LLC v. Barnes,* ___Ark. ___, ___ S.W.3d___, 2002 WL 1339861 (Jun. 20, 2002); *Cash in a Flash Check Advance of Arkansas, LLC v. Spencer,* 348 Ark. 459, 74 S.W.3d 600 (2002); *E-Z Cash Advance, Inc. v. Harris,* 347 Ark. 132, 60 S.W.3d 436 (2001). In addition, this court has yet to consider the viability of the general-release defense. The point, according to the Westark appellees, is that had they not settled, they would have contested class certification based on these two defenses and appealed any adverse order.

Being mindful of this court's strong jurisprudence against usury as well as Article 19, section 13 of the Arkansas Constitution, we conclude that Ballard and Cain have a *bona fide* argument on the merits. However, we quickly add that by concluding as we do, we are not deciding the merits of the usury question in their favor. This distinction was noted by the *Grunin* court:

> [N]either the trial court in approving the settlement nor this Court in reviewing that approval have the right or duty to reach any ultimate conclusions on the issues of fact and law which underlie the merits of the dispute.

Grunin, 513 F.2d at 123 (quoting *City of Detroit v. Grinnell Corp.*, 495 F.2d at 456 (2d Cir. 1974)). Nor can we proceed in our analysis with any assumption that the class will prevail and collect all damages claimed. *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980).

(ii) Potential litigation recovery compared to settlement.

Ballard and Cain also contend that the settlement is inadequate, unfair, and unreasonable when compared to a likely recovery after litigation. They mount two primary arguments to support their position. The first concerns the monetary value of the settlement as opposed to a potential litigation recovery. The settlement agreement contemplates a cash outlay of $605,000 by the Westark defendants, including $170,000 in attorneys' fees. The face value of the bonds available for claims is $870,000. Ballard and Cain claim that, in contrast, a damage recovery following litigation could be as high as $27 million, based on doubling the fees collected by the Westark appellees. They also emphasize that the $605,000 settlement is subject to a set-off for the amount of any outstanding cash advances owed by individual class members. In a litigated recovery, Ballard and Cain contend that those outstanding debts would be void as consumer loans under Article 19, section 13. Finally, they assert that it is unfair to distribute the settlement funds in the form of savings bonds which will not mature for sixteen years.

Ballard and Cain further point to the continuing viability of the Westark appellees following the settlement. They argue that under the terms of the settlement agreement, the defendant check-cashing establishments will be free to continue their businesses so long as they simply re-name the transactions. For example, instead of calling the transactions

"deferred presentment transactions," they claim the Westark defendants could rename the same transactions "pay-day loans" and still comply with the settlement. Indeed, they point out that Jeff Forsey, as CEO of fourteen of the nineteen Westark businesses, testified that he and his board of directors were looking into that very option. By contrast, Ballard and Cain assert that a victory on the merits following litigation would shut down the businesses permanently, either through a judgment that would bankrupt the corporations or through a judgment that concluded the business practices were unconstitutional.

The Westark appellees make three arguments in response. First, they argue that a settlement is always lower than a potential litigation recovery, because otherwise there would be no incentive to settle. They also claim that their ability to pay a larger sum is limited, and that a large jury verdict would be unrecoverable in any event, because the affected businesses would seek bankruptcy protection. Therefore, they assert that as a practical matter, litigation of the case would be futile. In addition, the Westark appellees cite *Petrovic v. Amoco*, 200 F.3d 1140 (8th Cir. 1999), for the proposition that once a trial court has determined that a settlement is fair and adequate, the fact that a defendant could have paid more is not a legitimate reason to reject the settlement.

The Westark appellees' second argument is that the settlement contains a significant benefit to the class that Ballard and Cain do not discuss. Under the settlement, the class members would be able to write off any outstanding debt after the ninety-day period from the settlement date has expired. Thus, class members who did not make a claim under the settlement agreement would not face collection on their checks. Third, they argue that the settlement agreement hastens the class members' recovery and avoids the delays of litigation.

While we are attuned to the legitimacy of the arguments made by Ballard and Cain, the Westark defendants also make valid points about their defenses. We recognize that

the purpose of a settlement is to avoid the delay, expense, and risk of trial. *Grunin v. Int'l House of Pancakes, supra.* We further are reluctant to hold that this settlement does not fall within the range of reasonableness when compared to what the class might have ultimately recovered. A full recovery of $27 million based on collecting twice the amount of interest paid under section (b) of Article 19, section 13, of the Arkansas Constitution for all other loans is somewhat speculative, considering that the merits of their constitutional claim have never been decided. But even assuming full recovery, a settlement which embraces Series EE Bonds totaling $870,000 and forgiveness of debt after ninety days has considerable value. As one court has put it:

> While plaintiffs cannot predict what each claimant will receive, the Second Circuit has held that a settlement can be approved even though the benefits amount to a small percentage of the potential recovery sought. *Grinnell*, 495 F.2d at 455. "The fact that a proposed settlement may only amount to a fraction of the potential recovery does not, in and of itself mean that the proposed settlement is grossly inadequate and should be disapproved." *Id.* (footnote omitted). The Court explained: "In fact there is no reason, at least in theory, why a satisfactory settlement could not amount to a hundredth or even a thousandth part of a single percent of the potential recovery." *Id.* at 455 n.2. In the District Court decision in *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380, 1386 (S.D.N.Y. 1972). *aff'd in part, rev'd in part,* 495 F.2d 448 (2d Cir. 1974), Judge Charles Metzner of the Court found a proposed settlement of 3.2% to 3.7% of the potential recovery "well within the ball park."'

In re Milken & Assoc. Securities Litigation, 150 F.R.D. 46, 54 (S.D.N.Y. 1993). In short, we do not find this argument to be dispositive of the issue.

b. The defendant's overall financial condition and ability to pay.

To a lesser extent, the fairness of the class settlement turns on the Westark appellees' ability to pay more than the $605,000 to settle the matter under *Grunin*. Here, Ballard and Cain assert that Jeff Forsey's own testimony swings this factor in their favor. They point to his statement that during the ninety-day window alone, the Westark appellees could receive check-cashing revenues that exceed the value of the cash outlay - $605,000. They also claim that Forsey's testimony revealed such liquidity in the Westark appellees' businesses that a far greater settlement agreement could have been negotiated. According to his figures, the businesses were worth some $2.7 million as of December 31, 2000, after deducting bad debt that they would not be able to collect. The Westark appellees dispute these figures. They also claim that they have little cash on hand and that operating overhead reduces the amount available for the settlement fund. We do not consider the disputed claim that the Westark appellees could have paid more than $605,000 to be a persuasive reason for overturning the settlement.

c. The complexity, length and expense of further litigation.

The third factor in determining the fairness of a class settlement is the burden of litigating the case. This factor is also subordinate to the first factor but should still be considered in determining whether the trial court abused its discretion in approving the settlement. The Westark appellees emphasize that further litigation would have caused delay, and that delay would have caused more members of this low-income transient class to become lost due to relocation. They further point to the immediate benefit of a settlement versus the contingency of protracted litigation. We agree that this bird-in-the-hand argument militates in favor of the settlement.

d. Opposition to the settlement.

The fourth and final factor in determining the fairness and adequacy of a class settlement is the degree of opposition to the settlement. Again, this factor is less important than the first factor. The Westark appellees contend that only seventeen members of the approximately 18,500 member class objected. This is true. However, one court has sounded a note of caution in this regard:

> [A] low level of vociferous objection is not necessarily synonymous with jubilant support. In many class actions, the vast majority of class members lack the resources either to object to the settlement or to opt out of the class and litigate their individual cases.

In re Corrugated Container Antitrust Litigation, 643 F.2d 195, 217-18 (5th Cir. 1981) *See also Bell Atlantic Corp. v. Bolger*, 2 F.3d 1304, n.15 (3d Cir. 1993) (noting that absent class members "have an insufficient incentive to contest an unpalatable settlement agreement because the cost of contesting exceeds the objector's *pro rata* benefit").

Again, it was the trial judge who was in the trenches and lived with this class litigation. He assessed the risk of litigation, the delay in recovery, the amount of recovery claimed versus the settlement that was struck, as well as the other *Grunin* factors, and concluded that the settlement was fair and reasonable. We accord the trial court deference in these matters and are unwilling to second-guess the decision based on the arguments presented by Ballard and Cain in this appeal.

e. Collusion

Though not a factor in the *Grunin* analysis, Ballard and Cain make the further charge of collusion between Martin and the Westark appellees due to the fact that the settlement was reached before the class was certified. Other

jurisdictions have held that when a settlement is entered into before a class is certified, the settlement should be subject to heightened scrutiny. *See, e.g., In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 55 F.3d 768 (3d Cir. 1995); *Bowling v. Pfizer, Inc.*, 143 F.R.D. 141 (S.D. Ohio 1992). Though it is apparent that the settlement under review was hurried and ultimately global in the number of check-casher businesses involved, there is no proof that the settlement was not made at arm's length. There are definitely benefits accruing to the class in the form of reimbursements and debt forgiveness. The fact that the class could have gotten more does not translate into collusion. We affirm on this point.

II. Adequacy of Class Representatives

Ballard and Cain next contend that Martin and Spencer were inadequate representatives to protect the interests of the class members and that Martin's class counsel was likewise inadequate.[4] This issue is decided by our recent case of *USA Check Cashers of Little Rock, Inc. v. Island*, 349 Ark. ___, ___S.W.3d___(May 30, 2002). As we said in that case, we review a trial court's grant of class certification under an abuse-of-discretion standard. *See USA Check Cashers, supra.*

Rule 23(a) of the Arkansas Rules of Civil Procedure has as one of the four prerequisites to a class action:

> (4) the representative parties will fairly and adequately protect the interests of the class.

Ark. R. Civ. P. 23(a)(4). *See also BPS Inc. v. Richardson*, 341 Ark. 834, 20 S.W.3d 403 (2000). This court has previously interpreted that subsection to require three elements:

> (1) the representative counsel must be qualified, experienced, and generally able to

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[4] At the fairness hearing, the adequacy of Martin as class representative was specifically attacked.

> conduct the litigation; (2) that there be no evidence of collusion or conflicting interest between the representative and the class; and (3) the representative must display some minimal level of interest in the action, familiarity with the practices challenged, and ability to assist in decision making as to the conduct of the litigation.

Mega Life & Health Ins. Co. v. Jacola, 330 Ark. 261, 275, 954 S.W.2d 898, 904 (1997). In a similar vein, this court has held that the element of adequacy is met if the class representative displays a *minimal* level of interest in the action, familiarity with the challenged practices, and the ability to assist in litigation decisions. *See Direct Gen. Ins. Co. v. Lane,* 328 Ark. 476, 944 S.W.2d 528 (1997).

Martin testified at the fairness hearing that she was pleased with the legal representation provided to her and that her attorneys had kept her informed of what was going on the case. She also stated that her goal in suing the defendants was to put an end to the check-cashing practices of the Westark appellees. She testified that she talks to her attorneys regularly and is kept abreast of the proceedings. Based on this testimony, we fail to discern any abuse of discretion in the trial court's finding that Martin is an adequate class representative.

Furthermore, the allegation that the law firm of Orr, Scholtens, Willhite & Averitt is inadequate class counsel is meritless. These attorneys are currently handling a raft of cases against Arkansas check cashing businesses. They have extensive class-action experience, and there is nothing to suggest that they are inadequate counsel for the class in this case. This court has held that absent a showing to the contrary, we presume that the class representative's counsel will vigorously and competently pursue the litigation. *See Mega Life & Health Ins. Co. v. Jacola, supra* (citing Herbert B. Newberg, *Newburg on Class Actions,* §§ 3.24, 3.42 (3d ed. 1992)).

We affirm the trial court on this point.

III. Subpoenas

Ballard's third point, which Cain does not join, relates to the subpoenas for financial documents issued five days before the fairness hearing on June 1, 2001. Ballard sought full disclosure of the Westark appellees' financial information in order to determine their ability to pay more than the settlement. At the hearing, the businesses, acting through CEO Forsey, only produced a portion of the financial documents sought. Nevertheless, the trial court ruled that this partial production, in addition to the personal appearance and testimony of Forsey, was sufficient in light of the short period of time that the companies had to respond. Ballard argues that this ruling was an abuse of the trial court's discretion. She points out that it was the short notice to the class—roughly two weeks before the fairness hearing—-that prevented her from intervening sooner and from issuing subpoenas in a more timely manner.

It is boilerplate law that a trial court has broad discretion in matters pertaining to discovery, and the exercise of that discretion will not be reversed by this court absent an abuse of discretion that is prejudicial to the appealing party. *Loghry v. Rogers Group, Inc.*, 348 Ark. 369, 72 S.W.3d 499 (2002) (citing *Alexander v. Flake*, 322 Ark. 239, 910 S.W.2d 190 (1995); *Rankin v. Farmers Tractor & Equipment Co., Inc.*, 319 Ark. 26, 888 S.W.2d 657, (1994); *Jenkins v. Int'l Paper Co.*, 318 Ark. 663, 887 S.W.2d 300 (1994)). In the instant case, Ballard does not illuminate how she was prejudiced by the lack of additional financial information. Nor does she assert how her challenge to the settlement would have been different if she had obtained full compliance with the subpoenas. We note that Ballard did argue both to the trial court and to this court that total liability to the 18,500 class members was $27 million and that the Westark appellees would bring in more than $605,000 in revenue during the ninety-day period following the settlement date. Certainly, the financial information that she had on hand enabled her to fully mount her arguments against the settlement. In light of the fact that the subpoenas came less than a week before the

fairness hearing, it was within the trial court's discretion to deem partial compliance sufficient. The trial court's ruling on this issue is affirmed.

IV. Adequacy of the Notice

Ballard and Cain's fourth point is that notice of class certification, the settlement, and the date of the fairness hearing to class members was inadequate for two reasons. First, they maintain that the notice came too close in time to the fairness hearing itself to be effective. Secondly, they argue that the method of notifying the class—standard U.S. mail rather than first-class mail—was inadequate, and thus, did not meet the due process requirements of Rule 23.

Again we turn to the *Grunin* case for guidance on this point. Due process requires that notice of a proposed settlement be given to a class. *Grunin v. Int'l House of Pancakes, supra.* The notice given must be "reasonably calculated, under all of the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id.* at 120 (quoting *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The notice must also reasonably convey the necessary information about the settlement and give interested class members a reasonable opportunity to make their appearance and voice any objections. *Id.*

This court has addressed a related notice issue before. In *SEECO, Inc. v. Hales*, 334 Ark. 307, 973 S.W.2d 818 (1998), we said:

> The mechanics of notice to class members is left to the discretion of the trial court and is subject only to the reasonableness standard of due process. See *Grunin v. Int'l House of Pancakes*, 513 F.2d 114, 121 (8th Cir. 1975), *cert. denied*, 423 U.S. 864, 96 S.Ct. 124, 46 L.Ed.2d 93 (1975). Arkansas Rule of Civil Procedure 23(c) provides in part that "the

> court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort." The United States Supreme Court has made reference to the fact that the "best notice practicable" under Federal Rule 23 is individual notice. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 94 S.Ct. 2140, 40 L.Ed.2d. 732 (1974) Notice by publication is used to supplement individual notice when class members cannot be identified by reasonable efforts. See *Eisen v. Carlisle & Jacquelin, Id.*

SEECO, Inc. v. Hales, 334 Ark. at 312, 973 S.W.2d at 820-21. In *SEECO, Inc.*, this court held that notice given thirty days prior to the opt-out date was adequate under these standards.

In the case before us, Ballard and Cain claim notice was not timely mailed so as to afford due process protection. The notice was mailed on May 16, 2001, and the fairness hearing was held on June 1, 2001. A two-week notice period was simply too short, they claim. On this point, we note that courts have approved notices given to a class within a comparable period before the fairness hearing. *See, e.g., Grunin v. Int'l House of Pancakes, supra* (holding that notice sent out nineteen days before fairness hearing was not a violation of due process); *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980) (holding that notice sent out twelve days before fairness hearing was not a violation of due process). Further, the notice contained an opt-out provision which advised the class members that they *could always choose to opt out of the settlement so long as they did so by August 15, 2001.* Thus, class members had approximately three-months notice of the opt-out deadline. Opting out of the settlement gave them the recourse to pursue their own claims against the particular check-casher businesses with which they were involved.

There is also the point that Ballard and Cain had an opportunity to appear at the fairness hearing, because they did so through counsel. Ballard even issued subpoenas to the Westark appellees five days before the fairness hearing. Had the abbreviated notice hampered their ability to participate in the fairness hearing on June 1, 2001, it seems that the particulars on how they were handicapped would been made known to the trial court or to this court.

Next, we consider the method of the individual mailing. In this case, individual notices were mailed to all potential class members by standard mail. Ballard and Cain, however, urge that due to the transient nature of this particular class, the notice should have been mailed first-class U.S. mail, so that the class members could take advantage of forwarding addresses, and class counsel could have undeliverable notices returned to them. We disagree. Martin, in her mailing to class members, claims that she requested return service for undeliverable notices at an additional cost. This was for the purpose of forwarding the notice to transient class members, according to Martin. Ballard and Cain reply that nothing regarding remailing returned notices to new addresses is in the record. But what the record does support is that forwarding addresses were requested by Martin at an added cost which presupposes this was for the purpose of remailing. Though, forwarded notice may have been too late for the June 1 fairness hearing, it certainly was timely notice of the right to opt out of the class. Plus, notice of class certification, the settlement, and the opt-out date (but not the fairness hearing) was supplemented by published notice in the *Arkansas Democrat-Gazette*, a newspaper with statewide circulation, on May 21, 2001. Granted, published notice may not have been read by some members of the class, but we are unwilling to denigrate published notice completely as offering no due process protection. Because individual notices were sent and the notice was published in a newspaper with a statewide circulation, we conclude that the notice given comported with minimum standards of due process. We affirm the trial court on this point as well.

As a final point, we note that Ballard and Cain have asserted a number of other deficiencies in the notice, the terms of the settlement, and the adequacy of class counsel. Those arguments are as follows: the terms of the settlement are inadequate because the unclaimed funds revert to the Westark appellees; the terms of the settlement make no provisions for claimants with judgments pending against them or whose debts have been discharged in bankruptcy; class counsel was inadequate for failing to bring claims against the stockholders of the Westark appellees and their sureties; and the notice to class was contradictory because it stated both that class members would still need to pay their unsatisfied debt and that collections would cease ninety days after the settlement date. These arguments are largely unsupported by authority and are not fleshed out in the briefs. None of them provides a convincing basis for holding that the trial court abused its discretion in approving the settlement. Furthermore, it is axiomatic that a settlement does not have to be perfect in order to fair. See, *e.g.*, *Joel A v. Giuliani*, 218 F.3d 132, 144 (2d Cir. 2000) ("[A] settlement agreement achieved through good-faith, non-collusive negotiation does not have to be perfect, just reasonable, adequate, and fair."); *Halderman v. Pennhurst State School & Hospital*, 610 F.Supp. 1221, 1222 (D.C.Pa. 1985) ("As with all things of this world, the settlement is not perfect. It is, however, a fair, adequate, and reasonable settlement . . . .").

Affirmed.

GLAZE, J., not participating.

APPENDIX B

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT
CIVIL DIVISION

SHEILA MARTIN and JIMMIE SUE SPENCER, Individually and o/b/o a Class of Similarly Situated Persons — PLAINTIFFS

TERESA BALLARD, CRYSTAL LUEBBERS, CHERYL KING, KENISHA BRYANT, and RICHARD LYNN — INTERVENORS

STEVEN CAIN and TERESA CAIN, ALBERT ANDERSON and LINGI ANDERSON, JOHN BROWN and MARY BROWN, BRYAN CLAYPOOL and TRACY CLAYPOOL, LARRY COCHRAN and REBECCA COCHRAN, JOHN S. FULLER and DOTTIE MAE REED — INTERVENORS

VS. NO. CIV-00-669 (L)

WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., d/b/a AMERICAN CHECK CASHERS, et al. — DEFENDANTS

FINAL JUDGMENT AND ORDER OF DISMISSAL
(FILED AUGUST 7, 2001)

On this 1st day of June, 2001, this cause came on to be heard pursuant to notice pursuant to the application of counsel for the parties for final approval of the settlement set forth in the class settlement stipulation filed herein. Plaintiffs' class representatives appeared in person and by

class counsel, Orr, Scholtens, Willhite & Averitt, P.L.C. and defendants appeared by company/corporate representative(s) and by counsel, Jones, Jackson and Moll, P.L.C. Intervenors appeared by counsel only, the Ballard intervenors appearing by the Nixon Law Firma and by Logan, Thompson, Miller, Bilbo, Thompson and Fisher, P.C. of Cleveland, Tennessee, and the Cain intervenors appearing by attorney Robert R. Cloar. Whereupon, a "fairness hearing" was conducted in order that the Court might determine whether or not the proposed settlement in this case should be approved and to otherwise address challenges made by the intervenors as to the adequacy of the settlement, class counsel, notice and otherwise. After consideration of the settlement stipulation, all papers filed and proceedings had herein, the objections of the intervenors as set out in the pleadings filed herein and considering the testimony of witnesses at the hearing along with the excellent post-trial briefs of all of the parties, and without considering the supplemental exhibit in support of plaintiffs' reply to intervenors' opposition to settlement agreement filed July 13, 2001, the Court finds, considers, orders and adjudges as follows:

1. Upon joint motion of the parties and upon finding that all requirements of Arkansas Rule of Civil Procedure 23 (a) and (b) are satisfied, the Court certified a conditional settlement class on or about April 30, 2001, for settlement purposes only. The conditional settlement class consists of all persons who have paid a fee to any of the defendant businesses for the time periods as set out in the notice introduced at the hearing as "Exhibit A" as subsequently modified by the Court so as to insert a closing date of May 14, 2001, rather than June 10, 2001, exclusive of any customers who have timely requested exclusion from the conditional settlement class under Arkansas Rule of Civil Procedure 23 and the terms of the settlement stipulation. The settlement period is up to and including May 14, 2001.

2. The Court further finds that plaintiffs, Sheila Martin and Jimmy Sue Spencer, and class counsel, Orr,

Scholtens, Willhite, & Averitt, P.L.C., are adequate class representatives under Arkansas Rule of Civil Procedure 23 (a) (4). Plaintiffs' counsel have vigorously pursued this case and other class action "check cashing" litigation and have negotiated a settlement which brings substantial benefit to the settlement class when considering the unsettled legal questions involved, the limited resources of defendants and the cost and risk of further protracted litigation.

3. The Court approved class counsel as the entity responsible for receipt of notice of claims, "opt outs," objections and other documentation from class members with responsibility for furnishing claim forms to Westark Financial Consultants, Inc., for calculation of damages owing to each claimant and to insure collection of said damages pursuant to the settlement.

4. The Court has jurisdiction over the subject matter of the litigation, the plaintiff and all members of the conditional settlement class, the defendant, and the intervenors for purposes of enforcing the settlement stipulation and this final judgment.

5. The Court finds that the mailing and publication of notice and summary of notice in accordance with the Court's April 30, 2001, Order constitutes the best notice practicable under the circumstances to all person who are members of the conditional settlement class, and fully satisfies the requirements of Arkansas Rule of Civil Procedure 23 (c), due process under the Arkansas and United States Constitutions and other applicable law. Intervention was permitted and intervenors were afforded a full hearing in connection with the proposed settlement, during which intervenors' counsel vigorously represented the intervenors' interests (and the interests of anyone else in the position of objecting to the proposed settlement) with full and complete opportunity to present and cross-examine witnesses, put on additional evidence, fully brief legal issues and otherwise.

6. Pursuant to, and in accordance with the requirements of Arkansas Rule of Civil Procedure 23(e), the Court approves the settlement of this litigation as set forth in the settlement stipulation and each of the releases and other terms set forth therein as fair, reasonable and adequate to the conditional settlement class. The parties to the settlement stipulation shall complete and finalize the settlement in accordance with the terms of the settlement stipulation.

7. Except for claims by persons who have validly and timely requested exclusion from the conditional settlement class, all claims that are asserted or could have been asserted in this litigation are dismissed with prejudice, with each party bearing their own costs.

8. Each member of the conditional settlement class is hereby deemed to have fully, finally and forever released and discharged all claims against the named defendants herein, their agents, stock holders, servants, employees, bonding companies or otherwise, arising out of this class action lawsuit or in any way based on their transactions with any of the defendants through the date of the settlement.

9. All members of the conditional settlement class are permanently barred and enjoined from filing or prosecuting, in any capacity and in any court, administrative tribunal or other form, any action or proceeding which involves or asserts any of the claims released herein.

10. All persons who file valid and timely requests for exclusion from the conditional settlement class shall not be bound by this final judgment or by the settlement stipulation.

11. The Court approves as fair and reasonable class counsel's attorney's fees and costs as set forth in the settlement stipulation, which shall be paid in accordance with the settlement stipulation.

12. The Court retains continuing jurisdiction over the litigation, the plaintiffs, the conditional settlement class, and the defendants for the purposes of supervising the implementation, enforcement, construction and interpretation of the settlement stipulation.

13. The motion of the Ballard intervenors to appoint class representatives, class counsel and to reconsider and certify the class filed (June 18, 2001), should be, and it is, hereby denied given the hereinabove findings to the effect that the settlement herein involved is fair, equitable, reasonable and adequate, and as relates to the adequacy of present class counsel. Intervenors and others who do not wish to participate in the settlement have the prerogative to "opt out" pursuant to the terms of the settlement/notice.

CONSIDERED, ORDERED AND ADJUDGED this 7 day of August, 2001.

"s/David Laser"
Circuit Judge

Law Bk 56 Pg 520-524
DATE: 08-08-2001
TIME: 09:58:23 AM
RECORDED IN
OFFICIAL RECORDS OF
CRAIGHEAD COUNTY, AR.
ANN HUDSON
CIRCUIT CLERK

"s/Bridget Haines", D.C.

APPENDIX C

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

SHEILA MARTIN, and JIMMIE SUE SPENCER, individually and o/b/o a class of similarly situated persons PLAINTIFFS

vs. NO. CIV-2000 0669(L)

WESTARK FINANCIAL CONSULTANTS OF LITTLE ROCK, INC., WESTARK FINANCIAL CONSULTANTS OF NORTH LITTLE ROCK, INC.; WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC.; WESTARK FINANCIAL CONSULTANTS OF JACKSONVILLE, INC.; WESTARK FINANCIAL CONSULTANTS OF PINE BLUFF, INC.; WESTARK FINANCIAL CONSULTANTS OF ROGERS, INC.; WESTARK FINANCIAL CONSULTANTS OF SPRINGDALE, INC.; WESTARK FINANCIAL CONSULTANTS OF RUSSELLVILLE, INC.; WESTARK FINANCIAL CONSULTANTS OF FAYETTEVILLE, INC.; WESTARK FINANCIAL CONSULTANTS, INC.; CASH ADVANCE OF BENTON, INC.; CASH ADVANCE OF NORTH LITTLE ROCK, INC.; CASH ADVANCE OF LITTLE ROCK, INC.; EXECUTIVE CASH ADVANCE OF LITTLE ROCK, INC.; C & B ENTERPRISES, INC., H&S ENTERPRISES OF ROGERS, INC.; H&S ENTERPRISES OF FAYETTEVILLE, INC.; H&S ENTERPRISES OF SPRINGDALE, INC.; AND PAYDAY ADVANCE OF FORT SMITH, INC. DEFENDANTS

ORDER PRELIMINARILY CERTIFYING CLASS AND APPROVING SETTLEMENT OF CLASS

ACTION, DIRECTING NOTICE OF PENDENCY AND SETTLEMENT, AND SETTING DATE FOR HEARING ON FINAL APROVAL OF SETTLEMENT OF CLASS ACTION

(FILED APRIL 30, 2001)

On April 27, 2001, the parties appeared, by and through counsel for the Plaintiffs, and moved this Court to certify a conditional settlement class for purposes of settlement only. Having considered the joint request of the parties, the settlement that has been entered into by the Plaintiffs and the Defendants which is attached to the Joint Motion to Certify Class, Approve Settlement of Class Action, Direct Notice of Pendency and Settlement, and Set Date for Hearing on Final Approval of Settlement of Class Action ("Joint Motion") as Exhibit A, and statements of counsel, the Court hereby enters this Order preliminarily certifying a settlement class, directing notice of pendency and settlement, and setting a date for a hearing for the Court to consider the final approval of the settlement agreed to by the parties herein.

IT IS HEREBY ORDERED as follows:

1. For purposes of this Order, the Court adopts the Settlement Agreement entered into by the parties and incorporates it by reference herein.

2. For purposes of settlement only, the Court preliminarily certifies this cause as a class action and preliminarily certifies a settlement class as detailed in Exhibit A to the Joint Motion. The conditional settlement class shall consist of all customers who have engaged in check cashing transactions with any of the defendants herein, exclusive of any customers who request exclusion from the conditional settlement class pursuant to Arkansas Rule of Civil Procedure 23 (c).

3. Plaintiffs are approved as the representatives of the settlement class, and the law firm of Orr, Scholtens,

Willhite & Averitt, PLC is approved as counsel for the settlement class.

4. The Court finds that the requirements of Rule 23 of the Arkansas Rules of Civil procedure have been satisfied and has made a preliminary determination that Plaintiffs are adequate class representatives of the settlement class.

5. The Court preliminarily approves the settlement of this class action lawsuit, as being fair, just, reasonable and adequate as to the settlement class and its members, subject to further consideration at the settlement hearing described below.

6. The Court approves as to form and content, and for distribution to the settlement class, the Notice of Pendency and Proposed Settlement of Class Action and Settlement hearing ("Notice") and the Proof of Claim and Release ("Proof of Claim") substantially in the forms attached to the Joint Motion as Exhibit B and C.

7. Defendants shall identify all persons who are part of the settlement class as provided herein. The Defendants shall cause to be mailed by U.S. Standard Mail the Notice to Settlement Class Members to the last known addresses provided by Defendants. The Defendants shall also cause a summary of the Notice to be published one time in the Arkansas Democrat-Gazette. The mailing and publication of the Notice and summary of Notice shall be completed no later than May 14, 2001. Defendants shall file with the Court and serve upon Plaintiffs' Counsel no later than ten (10) days prior to the settlement hearing a declaration stating that the mailings and the publication have been completed in accordance with the terms of this Order.

8. The Court finds that dissemination of the Notice in the manner required by the preceding paragraph constitutes the best notice practicable under the circumstances to settlement class members and meets the requirements of Rule 23 of the Arkansas Rules of Civil

Procedure, due process under the Untied States Constitution, and any other applicable law, and shall constitute due and sufficient notice to all persons entitled thereto.

9. Any person falling within the definition of the settlement class, as defined herein, may, upon request, be excluded from the settlement. Any such person must submit to Plaintiffs' Counsel a request for exclusion ("Request for Exclusion"), postmarked no later than August 15, 2001. A Request for Exclusion must state: (1) the name, address, social security number and telephone number of the person requesting exclusion, and (2) that the person wishes to be excluded from the settlement class. All persons who submit valid and timely Requests for Exclusion in the manner set forth in this paragraph shall have no rights under the settlement and shall not be bound by the settlement or the final judgment. Plaintiffs' Counsel shall provide copies of any and all Requests for Exclusion to Defendants' Counsel.

10. Any settlement class member who objects to the proposed settlement set forth herein shall have a right to appear and be heard at the settlement hearing. No later than three (3) days before the settlement hearing, any such person must file with the Court and deliver to plaintiffs' Counsel and Defendants' Counsel a written notice of objection and any brief opposing the settlement. The manner by which a notice of objection should be prepared, filed and delivered shall be stated in the Notice. Only settlement class members who have filed and delivered valid and timely written notices of objection will be entitled to be heard at the settlement hearing unless the Court orders otherwise.

11. The settlement hearing will be held on June 1, 2001, at 8:00 a.m., or as soon thereafter as possible, at the Craighead County Courthouse, 511 South Main Street, Jonesboro, Arkansas 72401, to determine whether the proposed settlement of this cause of action, as set forth herein, should be approved as fair, reasonable and adequate to the members of the settlement class, and whether the

judgment approved in the settlement should be entered. The Court may adjourn or continue the settlement hearing without further notice to settlement class members.

13. The proceedings connected with this action shall not be construed as an admission or concession by Defendants of the truth of any of the allegations made by the Plaintiffs herein or of any liability, fault or wrongdoing of any kind.

14. The judgment will permanently bar and enjoin the Plaintiffs and all members of the settlement class from instituting or prosecuting, in any capacity, any action or proceeding that involves or asserts any of the claims that were asserted, or that could have been asserted, in this action.

15. The Court may, for good cause, extend any of the deadlines set forth in this order without further notice to the settlement class members.

16. In the event the Court disapproves the settlement, the rights and duties of the parties will continue as if no settlement had been entered into and the conditional settlement class will be decertified without further order of the Court, and Defendants will not be prohibited from pursing any of the objections raised in their answer, including but not limited to, objections to venue and class certification.

IT IS SO ORDERED.

Dated: 4/30/01

"s/David N. Laser"
HONORABLE DAVID N. LASER
CRAIGHEAD COUNTY CIRCUIT JUDGE

APPROVED AS TO SUBSTANCE AND TO FORM

"s/Chris A. Averitt"
Chris A. Averitt
Attorney for Plaintiffs

"s/Mark Moll"
Mark Moll
Attorney for Defendants

Law Bk 55 Pg 927-932
DATE :0501-2001
TIME :10:35:31 AM
RECORDED IN
OFFICIAL RECORDS OF
CRAIGHEAD COUNTY, AR
ANN HUDSON
CIRCUIT CLERK
"s/Bridget Haines", D.C.

APPENDIX D

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

SHEILA MARTIN, and JIMMIE SUE SPENCER, individually and o/b/o a class of similarly situated persons PLAINTIFFS

vs. NO. CIV-2000 0669(L)

WESTARK FINANCIAL CONSULTANTS OF LITTLE ROCK, INC., WESTARK FINANCIAL CONSULTANTS OF NORTH LITTLE ROCK, INC.; WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC.; WESTARK FINANCIAL CONSULTANTS OF JACKSONVILLE, INC.; WESTARK FINANCIAL CONSULTANTS OF PINE BLUFF, INC.; WESTARK FINANCIAL CONSULTANTS OF ROGERS, INC.; WESTARK FINANCIAL CONSULTANTS OF SPRINGDALE, INC.; WESTARK FINANCIAL CONSULTANTS OF RUSSELLVILLE, INC.; WESTARK FINANCIAL CONSULTANTS OF FAYETTEVILLE, INC.; WESTARK FINANCIAL CONSULTANTS, INC.; CASH ADVANCE OF BENTON, INC.; CASH ADVANCE OF NORTH LITTLE ROCK, INC.; CASH ADVANCE OF LITTLE ROCK, INC.; EXECUTIVE CASH ADVANCE OF LITTLE ROCK, INC.; C & B ENTERPRISES, INC., H&S ENTERPRISES OF ROGERS, INC.; H&S ENTERPRISES OF FAYETTEVILLE, INC.; H&S ENTERPRISES OF SPRINGDALE, INC.; AND PAYDAY ADVANCE OF FORT SMITH, INC. DEFENDANTS

JOINT MOTION TO CERTIFY CLASS, APPROVE SETTLEMENT OF CLASS ACTION, DIRECT NOTICE OF PENDENCY ANDSETTLEMENT, AND SET DATE FOR HEARING ON FINAL APPROVAL OF SETTLEMENT OF CLASS ACTION

(FILED APRIL 27, 2001)

Comes now all of the parties involved herewith, by and through their attorneys of record, and state the following as their Joint Motion to Certify Class, Approve Settlement of Class Action, Direct Notice of Pendency and Settlement, and Set Date for Hearing on Final Approval of Settlement of Class Action:

1. The parties have entered into a Settlement Agreement resolving all issues raised herein. Attached hereto as Exhibit "A" is a true and correct copy of the Settlement Agreement.

2. The parties jointly request the Court preliminarily certify this cause as a class action and preliminarily certify a settlement class as detailed in Exhibit A. The conditional settlement class should consist of all customers who have engaged in check cashing transactions with any of the Defendants herein, exclusive of any customers who request exclusion from the settlement class pursuant to Arkansas Rule of Civil Procedure 23(c).

3. The parties jointly request the Court to approve Plaintiffs as the representatives of the settlement class, and the law firm of Orr, Scholtens, Willhite & Averitt, PLC as counsel for the settlement class.

4. The parties jointly request the Court to find that the requirements of Rule 23 of the Arkansas Rules of Civil Procedure have been satisfied and that Plaintiffs are adequate class representatives of the settlement class.

5. The parties jointly request the Court to preliminarily approve the settlement of this class action lawsuit, as being fair, just, reasonable and adequate as to the settlement class and its members.

6. The parties jointly request the Court to approve as to form and content, and for distribution to the settlement class, the Notice of Pendency and Proposed Settlement of Class Action and Settlement Hearing ("Notice") and the Proof of Claim and Release ("Proof of Claim") substantially in the forms as attached hereto as Exhibit B and C. The parties also jointly request the Court to preliminarily certify the class and approve the settlement of the class action. The parties also jointly request the Court to direct notice of pendency and settlement, and to set a date for hearing on the final approval of the settlement of the class action. See Exhibits B and C.

7. The parties jointly request the Court find that the dissemination of the Notice in the manner required by the Proposed Order Preliminarily Certifying Class and Approving Settlement of Class Action, Directing Notice of Pendency and Settlement, and Setting Date for Hearing on Final Approval of Settlement of Class Action constitutes the best notice practicable and meets the requirements of Rule 23 of the Arkansas Rules of Civil Procedure, due process under the United States Constitution, and any other applicable law, and shall constitute due and sufficient notice to all persons entitled thereto.

8. The parties jointly request that a settlement hearing be held on June 1, 2001, at 8:00 a.m., or as soon thereafter as possible, at the Craighead County Courthouse.

9. The parties jointly request that the proceedings connected with this action not be construed as an admission or concession by Defendants of the truth of any of the allegations made by the Plaintiffs herein or of any liability, fault or wrongdoing of any kind.

WHEREFORE, the parties hereto jointly request the Court approve the Settlement Agreement, Notice of Settlement, and enter a Proposed Order Preliminarily Certifying Class and Approving Settlement of Class Action, Directing Notice of Pendency and Settlement, and Setting Date for Hearing on Final Approval of Settlement of Class Action.

RESPECTFULLY SUBMITTED,

ORR, SCHOLTENS, WILLHITE
& AVERITT, PLC
P.O. Box 1267
Jonesboro, AR 72403
(870) 972-1500

By: "s/Chris A. Averitt"
Chris A. Averitt AR Bar #398-123
ATTORNEYS FOR PLAINTIFFS

JONES, JACKSON & MOLL, PLC
P.O. Box 2023
Fort Smith, AR 72902
(501) 782-7203

By: "s/Mark Moll"
Mark Moll AR Bar #79-210
ATTORNEYS FOR DEFENDANTS

Approved:
"s/Chris A. Averitt"
Chris A. Averitt, Attorney for Plaintiff
"s/Mark Moll"
Mark Moll, Attorney for Defendant

Law Bk 55 Pg 756-757
DATE: 04-02-2001
TIME : 10:57:26 AM
RECORDED IN OF
OFFICIAL RECORDS
CRAIGHEAD COUNTY, AR
ANN HUDSON

CIRCUIT CLERK
"s/Bridget Haines" D.C.

[EXHIBIT A TO APPENDIX D]

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

SHEILA MARTIN and JIMMIE SUE SPENCER, individually and o/b/o a class of similarly situated persons — PLAINTIFFS

v. — Case No. CIV-200-0669(F)

WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC. d/b/a AMERICAN CHECK CASHERS — DEFENDANT

[CONFIDENTIAL]

DEFENDANT'S SETTLEMENT OFFER

Payment to members of class:	Defendants will purchase E Series Bonds having a total face value of up to but not exceeding $870,000.00. The smallest bond to be purchased will have a face value of $50.00. A claimant will be entitled to receive a bond based on the following formula: Fees paid X 1.5 less balance of amount financed on any unpaid Deferred Presentment Agreement rounded to the nearest increment of $25.00. Any claim which totals $37.50 or less will receive a check in that amount as opposed to a bond. If the claims made by the members of the class exceed the total

	amount of the settlement fund, then the claims will be prorated.
Payment of attorneys fees:	Defendants would pay the law firm of Orr, Scholtens, Willhite & Averitt, PLC the sum of $170,000.00, to be paid $85,000.00 immediately following the court's approval of the class action settlement and the balance of $85,000.00 on the day the savings bonds and, if applicable, checks are mailed to the claimants.
Stores involved:	The class will consist of customers of the stores owned by the following corporations; WFC of Little Rock, WFC of North Little Rock, WFC of Jonesboro, WFC of Jacksonville, WFC of Pine Bluff, WFC, Inc., WFC of Rogers, WFC of Springdale, WFC of Russellville, and WFC of Fayetteville, ("WFC" is an abbreviation for Westark Financial Consultants), Cash Advance of Benton, Inc., Cash Advance of North Little Rock, Inc., Cash Advance of Little Rock, Inc., Executive Cash Advance of Little Rock, Inc., C&B Enterprises, Inc., H&S Enterprises of Rogers, Inc., H&S Enterprises of Fayetteville, Inc., and Payday Advance of Fort Smith, Inc. (Collectively "Defendants")

Notice:

(1) Counsel will agree on one notice to be sent to potential members of the class, notifying them of the litigation, their opportunity to opt out of the class, the terms of the proposed settlement, and a claim form will be enclosed.
(2) Plaintiff's counsel will be responsible for obtaining the court's permission to send the notice.
(3) Defendants will use their computer databases and archived files to obtain a list of all customers' name and addresses that Defendants can reasonable (sic) obtain and take responsibility for mailing the notices to the customers by regular mail.
(4) Defendants will run one display ad in the Arkansas Democrat. The ad will contain a summary of the mailed notice and notify potential members of the class that they can obtain a copy of the complete notice by contacting plaintiffs' counsel.
(5) Defendants will pay the cost of the newspaper advertisement. Plaintiffs' counsel will be responsible for paying one-half of the cost of the notice to class members, but defendants will advance all of the expenses and deduct plaintiffs' share of the cost from the first payment due to plaintiffs' counsel.
(6) The notice will expressly state

	that a class member's obligation to pay the Defendants has not been eliminated.
Claim Procedure:	A member of the class must complete a claim form in order to be entitled to participate in the distribution of the settlement funds. A customer who wants to make a claim fills out the claim form and sends or delivers it to plaintiffs' counsel. The claim forms will then be sent to Westark Financial Consultants, Inc. in Fort Smith for calculation of the damages.
Time period for counsel to agree on form of notice and claim form; Defendants to work on computer software and acquire address of customers:	April 24 - May 4, 2001.
Deliver notices, claim forms and mailing labels to printer:	May 5, 2001.
Preparation and mailing of notices:	May 6 – May 14, 2001.
Final preparation of spreadsheet showing names of customers and calculation of damages:	September 15 through October 30, 2001.
Opportunity for plaintiffs counsel to review spreadsheet:	November 1 through November 15, 2001.

Purchase and mailing of savings bonds:	November 15, 2001.
Release:	The class will release the defendants and their shareholders, directors, agents, employees and bonding company of all causes of action and claims that have been alleged in the pleadings or which could have been alleged in the pleadings. The releases will specifically provide that the defendants have paid compensatory and not punitive damages.
Collections:	Ninety (90) days following the date that the court enters an order approving the settlement, the Defendants will no longer use deferred presentment agreements and will write-off and not attempt to collect any unpaid deferred presentment agreements unless a customer has, prior to that date, agreed to a partial payment plan.

"s/Mark Moll"
Mark Moll
JONES JACKSON & MOLL, PLC
P.O. Box 2030
401 North 7th Street
Fort Smith, AR 72902-2023

For Each Offeror

Accepted subject to court approval:

"s/Chris A Averitt"
ORR, SCHOLTENS, WILLHITE
& AVERITT, PLC
113 East Jackson Avenue (72401)
P.O. Box 1267
Jonesboro, AR 72403-1267

[EXHIBIT B TO APPENDIX D]

IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY,
ARKANSAS
WESTERN DISTRICT

SHEILA MARTIN, and JIMMIE SUE SPENCER, individually and o/b/o a class of similarly situated persons — PLAINTIFFS

WESTARK FINANCIAL CONSULTANTS OF LITTLE ROCK, INC.; WESTARK FINANCIAL CONSULTANTS OF NORTH LITTLE ROCK, INC.; WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC.; WESTARK FINANCIAL CONSULTANTS OF JACKSONVILLE, INC.; WESTARK FINANCIAL CONSULTANTS OF PINE BLUFF, INC; WESTARK FINANCIAL CONSULTANTS OF ROGERS, INC.; WESTARK FINANCIAL CONSULTANTS OF SPRINGDALE, INC.; WESTARK FINANCIAL CONSULTANTS OF RUSSELLVILLE INC.; WESTARK FINANCIAL CONSULTANTS OF FAYETTEVILLE, INC.; WESTARK FINANCIAL CONSULTANTS, INC.; CASH ADVANCE OF BENTON, INC.; CASH ADVANCE OF NORTH LITTLE ROCK, INC., CASH ADVANCE OF LITTLE ROCK, INC.; EXECUTIVE CASH ADVANCE OF LITTLE ROCK, INC., C&B ENTERPRISES, INC.; H&S ENTERPRISES OF ROGERS, INC.; H&S ENTERPRISES OF FAYETTEVILLE, INC.; H&S ENTERPRISES OF SPRINGDALE, INC.; AND PAYDAY ADVANCE OF FORT SMITH, INC.

DEFENDANTS

TO: PERSONS WHO RECEIVED PAYDAY LOANS OR DEFERRED PRESENTMENT OPTION TRANSACTIONS ("CASH ADVANCES") AT ANY OF THE STORES LISTED BELOW AND DURING THE TIME PERIOD LISTED BELOW.

CHECK CASHING STORE	TIME PERIOD DURING WHICH CLAIMS HAVE ARISEN UNDER THE SETTLEMENT
AMERICAN CHECK CASHERS	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF BENTON	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF LITTLE ROCK	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF LITTLE ROCK 2	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF NORTH LITTLE ROCK	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CHECKS 2 CASH	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
PAYDAY MONEY STORE	OCTOBER 27, 2000 THROUGH JUNE 10, 2001
PAYDAY ADVANCE OF FORT SMITH	NOVEMBER 20, 2000 THROUGH JUNE 10, 2001
RIVER VALLEY CHECK CASHERS	APRIL 29, 2001 THROUGH JUNE 10, 2001

READ THIS NOTICE CAREFULLY, AS IT MAY AFFECT YOUR RIGHTS.

I. INTRODUCTION

This notice is provided pursuant to Rule 23 of the Arkansas Rules of Civil Procedure and the Order of the Circuit Court of Craighead County, Arkansas ("the Court") to advise you of

the conditional certification, for purposes of settlement only, of the plaintiff class described below, the proposed settlement of the litigation with the Defendants ('the settlement"), as well as to describe the rights you may have under the settlement and what steps you may take with respect to the settlement.

The following description of the Litigation and its background and the summary of the settlement have been prepared by counsel for the parties to the settlement. The Court has made no finding with respect to such matters, and the Notice is not an expression by the Court as to the merits of any claim or defense asserted by the parties in this litigation. This litigation relates to the business of "payday lending" or "deferred presentment option transactions" in which the Defendants are engaged in locations throughout the state of Arkansas. Plaintiffs claim that the Defendants' customers have been subjected to fees which exceed the usury limit set forth in the Arkansas Constitution. These claims are discussed below.

The parties to the settlement are (i) the representative Plaintiffs, Sheila Martin and Jimmie Sue Spencer ("Plaintiffs") and the members of the plaintiff class described herein, and (ii) the Defendants in this litigation which operate under the fictitious names listed above. The settlement Agreement is on file and available for inspection in the Office of Clerk of the Court.

II. BACKGROUND AND A DESCRIPTPION OF THE LITIGATION

Defendants are engaged in businesses of originating payday loans or Deferred Presentment Option Transactions. Typically, the customers write checks which are held by the Defendants for different periods of time. The checks are written for the amount of the cash advanced to the customer, plus a finance charge (also called check cashing fees and deferred presentment fees).

Plaintiffs commenced this litigation on December 8, 2000 by filing a complaint on behalf of current and former customers

of Westark Financial Consultants of Jonesboro, Inc. who have engaged in deferred presentment option transactions. Plaintiffs later amended their complaint to include all of the above companies operating as any of the above fictitious names. Plaintiffs claim that Defendants charge interest rates in excess of the legal limit. Defendants deny any wrongdoing and contend that the fees charged do not constitute interest for purposes of Arkansas usury law. Prior to filing this action, Plaintiffs' counsel conducted an extensive informal investigation which included inspection of documents obtained from non-parties and consultation with prospective witnesses and research of the applicable law. Plaintiffs' counsel have also engaged in formal discovery pursuant to the Arkansas Rules of Civil Procedure. Plaintiffs' counsel have engaged in arm's length settlement negotiations with counsel for Defendants. All of the pleadings involved in this action are available on file for inspection at the Craighead County Courthouse located at 511 Main Street, Jonesboro, Arkansas 72401.

III. THE PROPOSED SETTLEMENT

A proposed settlement of the litigation has been reached by Plaintiffs' counsel and Defendants' counsel. Defendants have vigorously denied, and continue to deny, all liability with respect to any and all of the facts or claims alleged in the complaint, but consider it desirable to settle and dismiss the claims on the merits with prejudice, thereby eliminating the substantial expense, inconvenience and distraction of continued litigation.

DEFENDANTS WILL PURCHASE E SERIES U.S. SAVINGS BONDS HAVING A TOTAL FACE VALUE OF UP TO BUT NOT EXCEEDING $870,000. The smallest bond to be purchased will have a face value of $50.00. A claimant will be entitled to receive a bond based upon the following formula: Fees paid X 1.5 less the balance of amount financed on any unpaid deferred presentment agreement rounded to the nearest increment of $25.00. Any claim which totals $37.50 or less will receive a check in that amount as opposed to a bond

which will be offset against the acquisition price of the bonds available for settlement. If the claims made by the members of the class exceed the total amount of the settlement fund, then the claims will be prorated. THE SETTLEMENT DOES NOT ELIMINATE ANY OBLIGATION THAT A CLASS MEMBER HAS TO PAY ANY OF THE CHECK CASHING STORES LISTED ABOVE.

IN ORDER TO BE ELIGIBLE TO RECEIVE A PORTION OF THE SETTLEMENT FUND, A CLASS MEMBER MUST COMPLETE, EXECUTE AND MAIL TO ORR, SCHOLTENS, WILLHITE & AVERITT, PLC, P.O. BOX 1267, JONEBORO, ARKANSAS 72403, A PROOF OF CLAIM AND RELEASE WHICH IS ENCLOSED WITH THIS NOTICE. SUCH PROOF AND RELEASE MUST BE POSTMARKED BY AUGUST 15, 2001.

A CLASS MEMBER WHO WISHES TO BE EXCLUDED FROM THE TERMS OF THIS SETTLEMENT MUST GIVE NOTICE IN WRITING AND MAIL THE NOTICE TO ORR, SCHOLTENS, WILLHITE & AVERITT, PLC, P.O. BOX 1267, JONESBORO, ARKANSAS, 72403. THIS NOTICE MUST BE POSTMARKED BY AUGUST 15, 2001. Other than this notice and a display ad to be run in the Arkansas Democrat Gazette, no further notice of the settlement will be provided to class members if the Court approves the settlement.

A class member's obligation to pay the Defendants has not been eliminated by the terms of this settlement.

After all of the claims have been received, Defendants shall prepare a spreadsheet which shall demonstrate the names, addresses, and damages for each class member by October 30, 2001. Plaintiffs' counsel shall review the spreadsheet and approve it by November 15, 2001.

Defendants shall purchase the savings bonds for claims over $37.50 and will mail the checks for claims in the amount of $37.50 or less on November 15, 2001. The savings bonds will be issued to the class members by the U.S. Treasury

Department and, therefore, Defendants have no control over when the class members will receive the bonds. Class members should consult with a tax preparer or certified public accountant of their choice with regards to any tax consequences of this settlement that may or may not exist.

As part of this settlement, participating class members will release Defendants from any and all claims which include any claims which were, or which could have been asserted in the litigation during the time periods listed above. All class members who do not timely and validly request exclusion will be bound by the settlement. If the settlement is approved by the Court, at the conclusion of the settlement payout, this litigation will be dismissed with prejudice as to all of the class members who have not exercised their right to be excluded from the terms of the settlement. Each class member shall be permanently barred from instituting any action against any of the Defendants which in any way relates to any released claims. If the settlement is disapproved of by the Court, the rights and duties of the parties will continue as if no settlement had been entered into.

COLLECTIONS: Ninety (90) days following the date that the court enters an order approving the settlement, the Defendants will no longer use deferred presentment agreements and will write-off and not attempt to collect any unpaid deferred presentment agreements unless a customer has, prior to that date, agreed to a partial payment plan. However, in the event an Arkansas Appellate court should issue an opinion holding that the fees associated with deferred presentment agreements do not constitute interest subject to the usury limit in Article 19, Section 13 of the Arkansas Constitution, Defendants shall be free to operate in any legal manner.

ORR, SCHOLTENS, WILLHITE & AVERITT, PLC has been approved by the Court as counsel for the class. The Court has also approved this notice and the notice procedure used herewith.

IV. NOTICE OF THE SETTLEMENT HEARING

The Settlement Hearing will be held on June 1, 2001, at 8:00 a.m., or as soon thereafter as possible, at the Craighead County Courthouse, 511 South Main Street, Jonesboro, Arkansas 72401, to determine whether the proposed settlement of this cause of action, as set forth herein, should be approved as fair, reasonable and adequate to the members of the settlement class, and whether the Judgment approving the settlement should be entered. The Court may adjourn or continue the Settlement Hearing without further notice to settlement class members. IF YOU APPROVE OR DO NOT OPPOSE THE SETTLEMENT, YOU DO NOT NEED TO APPEAR AT THE SETTLEMENT HEARING.

If you have questions concerning this notice, please write to ORR, SCHOLTENS, WILLHITE & AVERITT, PLC, P.O. BOX 1267, JONESBORO, ARKANSAS 72403. Do not contact the clerk of the Court or Judge David Laser.

V. ATTORNEYS' FEES AND EXPENSES

Defendants shall pay the law firm of Orr, Scholtens, Willhite & Averitt, PLC the sum of $170,000 to be paid $85,000.00 immediately following the Court's approval of the class action settlement and the balance of $85,000.00 on the day the savings bonds and checks are mailed to the claimants. Defendants will pay the cost of the newspaper advertisement. Orr, Scholtens, Willhite & Averitt, PLC will be responsible for paying one-half of the cost of the notice to class members, but Defendants will advance all of the expenses and deduct Orr, Scholtens, Willhite & Averitt, PLC's share of the cost from the first payment of attorneys' fees.

If You Wish Tc Make A Claim, Fill Out The Enclosed Claim Form

OFFICIAL COURT NOTICE

TO: ALL PERSONS WHO RECEIVED PAYDAY LOANS OR DEFERRED PRESENTMENT OPTION TRANSACTIONS ("CASH ADVANCES') AT ANY OF THE STORES LISTED BELOW AND DURING THE TIME PERIOD LISTED BELOW.

CHECK CASHING STORE	TIME PERIOD DURING WHICH CLAIMS HAVE ARISEN UNDER THE SETTLEMENT
AMERICAN CHECK CASHERS	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF BENTON	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF LITTLE ROCK	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF LITTLE ROCK 2	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CASH ADVANCE OF NORTH LITTLE ROCK	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
CHECKS 2 CASH	DECEMBER 8, 1995 THROUGH JUNE 10, 2001
PAYDAY MONEY STORE	OCTOBER 27, 2000 THROUGH JUNE 10, 2001
PAYDAY ADVANCE OF FORT SMITH	NOVEMBER 20, 2000 THROUGH JUNE 10, 2001
RIVER VALLEY CHECK CASHERS	APRIL 29, 2000 THROUGH JUNE 10, 2001

READ THIS NOTICE CAREFULLY, AS IT MAY AFFECT YOUR RIGHTS

Notice is hereby given that a proposed settlement has been reached in the class action entitled Sheila Martin, and Jimmie Sue Spencer v. Westark Financial Consultants of Little Rock, Inc.; Westark Financial Consultants of North Little Rock, Inc.; Westark Financial Consultants of Jonesboro, Inc.; Westark Financial Consultants of Jacksonville, Inc.; Westark Financial Consultants of Pine Bluff, Inc.; Westark Financial Consultants of Rogers, Inc.; Westark Financial Consultants of Springdale, Inc; Westark Financial Consultants of Russellville, Inc.; Westark Financial Consultants of Fayetteville, Inc.; Westark Financial Consultants, Inc.; Cash Advance of Benton, Inc.; Cash Advance of North Little Rock, Inc.; Cash Advance of Little Rock, Inc.; Executive Cash Advance of Little Rock, Inc.; C&B Enterprises, Inc.; H&S Enterprises of Rogers, Inc.; H&S Enterprises of Fayetteville, Inc.; H&S Enterprises of Springdale, Inc.; and Payday Advance of Fort Smith, Inc., Craighead County Circuit Court Case No. CIV-2000-0669(L).

ARE YOU A CLASS MEMBER?

You are member of the settlement class if you have entered into a payday loan or deferred presentment agreement ("cash advance") from any of the Defendants listed above operating under any of the above names during the dates listed above.

WHAT ARE THE TERMS OF THE SETTLEMENT?

Defendants will purchase E Series U.S. savings bonds having a total face value of up to but not exceeding $870,000.00. The smallest bond to be purchased will have a face value of $50.00. A claimant will be entitled to receive a bond based upon the following formula: Fees paid X 1.5 less balance of any amount financed on any unpaid deferred presentment agreement rounded to the nearest increment of $25.00. Any

claim which totals $37.50 or less will receive a check in that amount as opposed to a bond, which will be offset against the acquisition price of the bonds available for settlement. If the claims made by the members of the class exceed the total amount of the settlement fund, then the claims will be prorated.

WHEN MUST I MAKE A CLAIM?

In order to be eligible to receive a portion of the settlement fund, a class member must complete, execute and mail a pre-addressed proof of claim and release form which can be obtained from Orr, Scholtens, Willhite & Averitt, PLC, P.O. Box 1267, Jonesboro, Arkansas 72403. CLAIMS MUST BE POSTMARKED BY AUGUST 15, 2001.

THIS NOTICE IS ONLY A SUMMARY.

If you think you may be a member of the class and you did not receive the written settlement notice by mail, you should request one by writing to Orr, Scholtens, Willhite & Averitt, PLC, P.O. Box 1267, Jonesboro, Arkansas 72403.

WHAT IF I STILL OWE ONE OF THE STORES LISTED ABOVE?

If you currently have an obligation to any of the check cashing stores listed above, then your obligation to pay still exists; it has not been eliminated by the terms of the settlement.

THE LAST DAY TO OPT OUT OF THE SETTLEMENT IS AUGUST 15, 2001.
PLEASE DO NOT CONTACT THE COURT OR THE COURT CLERK.

[EXHIBIT C TO APPENDIX D]
IN THE CIRCUIT COURT OF CRAIGHEAD COUNTY, ARKANSAS
WESTERN DISTRICT

SHEILA MARTIN, and JIMMIE SUE SPENCER, individually and o/b/o a class of similarly situated persons PLAINTIFFS

WESTARK FINANICAL CONSULTANTS OF LITTLE ROCK, INC.; WESTARK FINANCIAL CONSULTANTS OF NORTH LITTLE ROCK, INC.; WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC.; WESTARK FINANCIAL CONSULTANTS OF JACKSONVILLE, INC.; WESTARK FINANCIAL CONSULTANTS OF PINE BLUFF, INC; WESTARK FINANCIAL CONSULTANTS OF ROGERS, INC.; WESTARK FINANICAL CONSULTANS OF SPRINGDALE, INC.; WESTARK FINANCIAL CONSULTANTS OF RUSSELLVILLE INC.; WESTARK FINANCIAL CONSULTANTS FAYETTEVILLE, INC.; WESTARK FINANCIAL CONSULTANTS, INC.; CASH ADVANCE OF BENTON, INC.; CASH ADVANCE OF NORTH LITTLE ROCK, INC.; CASH ADVANCE OF LITTLE ROCK, INC.; EXECUTIVE CASH ADVANCE OF LITTLE ROCK, INC; C&B ENTERPRISES, INC.; H&S ENTERPRISES OF ROGERS, INC.; H&S ENTERPRISES OF FAYETTEVILLE, INC.; H&S ENTERPRISES OF SPRINGDALE, INC.; AND PAYDAY ADVANCE OF FORT SMITH, INC.
DEFENDANTS

CLAIM FORM

The Proposed claim form shall be a separate document included with the notice. The claim form shall be preaddressed to ORR, SCHOLTENS, WILLHITE & AVERITT, PLC, P. O. BOX 1267, JONESBORO, ARKANSAS 72403. Each claimant shall be responsible for postage. The following shall be clearly printed on each form. This claim form may be modified to include information necessary for Defendants to discover and calculate each claimants' claim as well as

information that may be necessary to purchase the appropriate savings bonds on behalf of each claimant.

CLAIM FORM

My name is: _____.
My current address is: _____.
My current phone number (if available) is: _____.
My social security number is: _____.
I did business with the following Check cashing store(s):_ _____.

I believe I have a claim arising out of the settlement entered in Craighead County Circuit Court Case No. CIV-2000-0669(L). Please accept this as my proof of claim and mail me the amount that I am due, if any, to the above address. I acknowledge that, as a member of the class, I am releasing any and all claims that I may have as the release is described in the notice that I have received.

_____
My signature.

THIS CLAIM FORM IS VOID UNLESS POSTMARKED BY AUGUST 15, 2001
I AM AWARE THAT I AM RESPONSIBLE FOR POSTAGE

No. 02-542

Supreme Court, U.S.
FILED
NOV 13 2002
OFFICE OF THE CLERK

In The

Supreme Court of the United States

TERESA BALLARD, ET AL.,

Petitioners,

v.

SHEILA MARTIN, ET AL. and WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of The State Of Arkansas

BRIEF IN OPPOSITION OF RESPONDENTS SHEILA MARTIN, ET AL.

CHRIS A. AVERITT
Counsel of Record
JAY SCHOLTENS
KEVIN J. ORR
ORR, SCHOLTENS, WILLHITE & AVERITT, PLC
P. O. Box 1267
Jonesboro, AR 72403
(870) 972-1500

Attorneys for Respondents Sheila Martin, et al.

COCKLE LAW BRIEF PRINTING CO. (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Petitioners frame the statement of the question presented as follows: Does due process require the adoption and use of objective standards to gauge whether a trial court abused its discretion in approving a proposed class action settlement agreement? However, in their argument, Petitioners suggest that, although the Arkansas Supreme Court adopted the objective standards set out in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), the Court misapplied the standards to the facts of this case. Petitioners do not assert that the *Grunin* standards fail to provide due process protections, but argue that the Arkansas Supreme Court misapplied the applicable rule of law to the facts of this case.

Thus, this appeal involves Petitioners' fact-intensive arguments as to why the Arkansas Supreme Court, in analyzing the objective standards set out in *Grunin,* should have ruled in their favor. Respondents, Sheila Martin, et al., submit that the Arkansas Supreme Court's ruling was proper in all respects and respectfully request this Honorable Court to deny the Petition for Writ of Certiorari. This case raises no significant issues of law that warrant this Court's review, presents no conflict of authority, turns on its own facts, and will affect few others besides the litigants.

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STATEMENT OF JURISDICTION

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari should only be granted for compelling reasons. This Honorable Court should decline the exercise of its jurisdiction because Petitioners have failed to establish any compelling reasons for review of the Arkansas Supreme Court's unanimous, thorough, and well-reasoned opinion, which affirmed the trial court's ruling that the settlement involved herein is fair and reasonable. A petition for a writ of certiorari is rarely granted when, as in the present case, the asserted error consists of an alleged misapplication of a properly-stated rule of law.

STATEMENT OF THE CASE

Petitioners appealed to the Arkansas Supreme Court from the Final Judgment and Order of Dismissal entered August 7, 2001, by the Circuit Court of Craighead County Arkansas approving a class action settlement. **Appendix B 23a.**

Prior to the settlement, Respondents, Westark Financial Consultants of Jonesboro, Inc., et al. ("Westark"), engaged in deferred presentment check-cashing transactions which Respondents, Sheila Martin, et al., alleged violated the Arkansas usury law. **Appendix A 2a.** Westark responded by denying that the fees charged were interest charges covered by the Arkansas usury law. Westark also argued that Respondents, Martin and Spencer, as well as most of the class, had signed mandatory arbitration clauses as well as general releases. **Appendix A 10a.**

Under the terms of the settlement, Westark would deposit $605,000.00 into a settlement pool. $435,000.00 of the amount would be used to purchase Series E bonds totaling $870,000.00 to pay the claims of aggrieved customers at a rate of one-and-one-half times any fees paid by those customers. **Appendix A 3a.** The settlement agreement further provided that Westark would, after the expiration of ninety days, discontinue its operations unless an appellate court were to rule that its service charges were not usurious. **Appendix A 3a.**

The trial court entered an order certifying the class, adopting the settlement, and requiring notice to the class by publication and by individual notices. **Appendix A 3a.** After receiving the notice, Petitioners moved to intervene and challenged the fairness of the settlement. **Appendix A 4a.**

The trial court conducted a fairness hearing to determine the fairness of the settlement. In support of the settlement, Respondents, Martin et al., presented the testimony of Martin herself, as well as the testimony of Chris Lawson, a partner at the law firm of Friday, Eldredge & Clark. **Appendix A 4a.** Westark presented the testimony of Jeff Forsey, its chief executive officer and as custodian of financial documents. **Appendix A 5a.** Petitioners' Statement of the Case and Argument contain numerous factual allegations regarding Forsey's testimony and concerning Westark's financial condition. These statements are not supported by the Arkansas Supreme Court's opinion or by any document contained in the Appendix. As such, with regards to this witness' testimony, Respondents, Martin et al., deny the unsupported factual allegations made by Petitioners with regards to Westark's financial condition and incorporate by reference the

information contained in the Arkansas Supreme Court's opinion concerning the testimony elicited from this witness. **Appendix A 5a.**

At the fairness hearing, not one class member testified in opposition to the settlement, and Petitioners appeared solely through counsel. **Appendix B 24a.** After the hearing, and after receiving extensive briefs from all parties, the trial judge approved the settlement as fair and reasonable. **Appendix B 23a-27a.** Petitioners appealed.

On July 5, 2002, the Arkansas Supreme Court issued its unanimous opinion which upheld the decision of the trial court. **Appendix A 1a-27a.** In this opinion, the Arkansas Supreme Court indicated that Petitioners were requesting the Court to adopt the Eighth Circuit Court of Appeals' standards set out in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975). **Appendix A 6a.** In its analysis, the Court indicated that it was adopting the *Grunin* factors and analyzing the settlement using those factors. **Appendix A 7a.**

Petitioners now argue that the Arkansas Supreme Court "nominally adopted" the *Grunin* standards. Thus, although the Arkansas Supreme Court adopted the very standards advocated by Petitioners, Petitioners now argue that they were denied their due process rights because they disagree with the Arkansas Supreme Court's analysis of the settlement involved herein using those standards.

SUMMARY OF ARGUMENT

The Arkansas Supreme Court adopted the standards from *Grunin v. Int'l House of Pancakes, supra*, applied that

law to the facts in this case, and concluded that the trial court did not abuse its discretion in approving the class settlement. The court analyzed each issue raised on appeal according to the *Grunin* factors. The Petitioners received adequate due process, and the Arkansas Supreme Court's ruling was proper in all respects. Respondents, Martin et al., respectfully request this Honorable Court to deny the Petition for Writ of Certiorari. This case raises no significant issues of law that warrant this Court's review.

REASONS FOR DENYING THE WRIT

I. THE ARKANSAS SUPREME COURT ADOPTED AND APPLIED THE VERY STANDARDS ADVOCATED BY PETITIONERS

The Petitioners complain that the Arkansas Supreme Court adopted the standards set out in *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975), but proceeded to misinterpret and misapply the standards enunciated in *Grunin*, resulting in a denial of due process. The Petitioners do not assert that the *Grunin* standards fail to provide due process protections, but simply argue that the Arkansas Supreme Court misapplied the facts of this case to an otherwise properly stated rule of law.

II. PETITIONERS RECEIVED ADEQUATE DUE PROCESS OF LAW

The Petitioners received adequate due process of law. Before approving the settlement, the trial court conducted a full fairness hearing and considered all of the evidence presented in favor of the settlement as well as Petitioners' objections. Petitioners did not attend the hearing to testify

in opposition to the settlement. **Appendix B 24a.** However, Petitioners' counsel attended the hearing and cross-examined witnesses. After the hearing, and after receiving extensive briefs from all parties, the trial court approved the settlement as fair and reasonable. **Appendix B 23a-27a.** After this ruling, Petitioners were afforded a full appeal which resulted in a unanimous and thorough analysis of each of Petitioners' arguments. As such, Petitioners have been afforded a wealth of due process in this case.

Additionally, Petitioners misstate the Arkansas Supreme Court's ruling in an attempt to strengthen their arguments. Petitioners argue that the Arkansas Supreme Court "recognized Petitioners had made a 'bona fide' argument that the . . . settlement was not comparable to the potential recovery." This statement is found nowhere in the Arkansas Supreme Court's opinion. Rather, the Arkansas Supreme Court found that Petitioners' had a bona fide argument that Respondents, Martin et al., had a strong argument on the merits of their case against Westark. **Appendix A 10a.** However, despite this finding, the Arkansas Supreme Court also acknowledged that it could not assume "that the class w[ould] prevail and collect all damages claimed." **Appendix A 11a.**

Petitioners also incorrectly argue that the Arkansas Supreme Court "effectively" shifted the burden of proof to Petitioners. The flaw in Petitioners' argument is illustrated in the "Questions Presented" section of Petitioners' Petition in which they acknowledge that the question before the Arkansas Supreme Court was whether the "trial court abused its discretion in approving a proposed class

action settlement agreement." Thus, Petitioners acknowledge that the standard of review applicable to the Arkansas Supreme Court was an abuse of discretion standard.

The Arkansas Supreme Court properly applied an abuse of discretion standard to the evidence in the appellate record and ruled that the trial court had not abused its discretion in approving the settlement. In fact, the Arkansas Supreme Court specifically acknowledged that "it was the trial judge who was in the trenches and lived with this class litigation. He assessed the risk of litigation, the delay in recovery, the amount of recovery claimed versus the settlement that was struck, as well as the other *Grunin* factors, and concluded that the settlement was fair and reasonable." **Appendix A 15a.** The Court further indicated that it would accord deference to the trial court in matters such as the one presented by this case and would not second-guess the decision of the trial court based upon Petitioners' arguments. **Appendix A 15a.** This analysis was proper in all respects.

III. THE CLASS MEMBERS RECEIVED ADEQUATE NOTICE

The notice to potential class members in this action was adequate. The notice of the fairness hearing was mailed to each class member at his or her last known address on May 16, 2001, and the fairness hearing was held on June 1, 2001. **Appendix A 4a.**

In its analysis, the Arkansas Supreme Court noted that courts have approved notices given to a class within a comparable period before the fairness hearing, citing *Grunin v. Int'l House of Pancakes*, *supra*, (holding that notice sent out nineteen days before fairness hearing was

not a violation of due process); *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980) (holding that notice sent out twelve days before fairness hearing was not a violation of due process). **Appendix A 20a.**

The Arkansas Supreme Court further held that the notice contained an opt-out provision which advised the class members that they could always choose to opt out of the settlement and had until August 15, 2001, to exercise that right. Class members had almost three months notice of the opt-out deadline. The Court noted that opting out of the settlement would give class members the recourse to pursue their own claims against the particular check-casher businesses with which they were involved. **Appendix A 20a.** The Court also reasoned that Petitioners failed to present any evidence to the trial court that the notice provided to class members hampered their ability to participate in the fairness hearing and, in fact, found the evidence to be to the contrary. **Appendix A 21a.**

The Arkansas Supreme Court also held that the mailing of individual notices to potential class members by standard mail was adequate, as such members of the class certainly had notice of their right to opt out of the class in plenty of time. The Court also found that, although standard mail was utilized in the initial notice, the parties requested return service for undeliverable notices at additional cost which presupposed that the parties re-mailed the notices to transient class members. Additionally, the Court noted that notice of class certification, the proposed settlement, and the opt-out date were supplemented by published notice in the *Arkansas Democrat-Gazette*, a newspaper with statewide circulation on May 21, 2001. Thus, the Court properly concluded that the

notice given comported with minimum standards of due process. **Appendix A 21a.**

IV. THIS CASE DOES NOT HAVE FAR-REACHING IMPLICATIONS

Because the Arkansas Supreme Court adopted and applied the very standards advocated by Petitioners, this case turns on the facts and not the law. This case does not present a situation in which there is a conflict of authority. Rather, Petitioners ask this court to second-guess the Arkansas Supreme Court's application of a correctly-stated rule of law.

Ultimately, the trial court and the Arkansas Supreme Court were asked to analyze Rule 23 of the Arkansas Rules of Civil Procedure as well as a provision of the Arkansas Constitution. The trial judge provided Petitioners with an opportunity to be heard in full. The trial court considered each argument made by Petitioners and, in its discretion, approved this settlement as fair and reasonable. The Arkansas Supreme Court, using objective standards, thoughtfully analyzed each issue presented by Petitioners and ruled that the trial court had not abused its discretion in approving this settlement.

Petitioners argue that the Arkansas Supreme Court's application of the *Grunin* factors will have a far-reaching effect because other class action settlements will be upheld. Given that the Arkansas Supreme Court adopted the very standards advocated by Petitioners, this argument is unsupported and illogical. To the contrary, the

decision below turns on its own facts and will affect few others besides the litigants.

CONCLUSION

The Arkansas Supreme Court adopted the standards from *Grunin v. Int'l House of Pancakes*, *supra.*, applied that law to the facts in this case, and concluded that the trial court did not abuse its discretion in approving the class settlement. The Court analyzed each issue raised on appeal according to those factors. The Petitioners received adequate due process, and the Arkansas Supreme Court's holding in this case was proper in all respects. For all of the foregoing reasons, Respondents Martin et al. respectfully request that this Honorable Court deny the Petition.

Respectfully submitted,

CHRIS A. AVERITT
Counsel of Record
JAY SCHOLTENS
KEVIN ORR

ORR, SCHOLTENS, WILLHITE & AVERITT, PLC
P.O. Box 1267
Jonesboro, AR 72403
(870) 972-1500

Attorneys for Respondents Martin, et al.

No. 02-542

(4)

Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

TERESA BALLARD, ET AL.

Petitioners

v.

SHEILA MARTIN and WESTARK FINANCIAL CONSULTANTS OF JONESBORO, INC., ET AL.

Respondents

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF THE
STATE OF ARKANSAS

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT L. JONES, JR.
Counsel of Record

Mark Moll
Jay W. Kutchka
JONES, JACKSON & MOLL, PLC
401 North 7th Street
P. O. Box 2023
Fort Smith, AR 72902-2023
479-782-7203

Attorneys for Respondents,
Westark Financial Consultants of Jonesboro, Inc., et al.

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PARTIES TO THE PROCEEDING AND STATEMENT PURSUANT TO RULE 29.6

For all nineteen Respondents, there is no parent or publicly held company owning ten percent (10%) or more of the corporation's stock.

1. Westark Financial Consultants of Little Rock, Inc.
2. Westark Financial Consultants of North Little Rock, Inc.
3. Westark Financial Consultants of Jonesboro, Inc.
4. Westark Financial Consultants of Jacksonville, Inc.
5. Westark Financial Consultants of Pine Bluff, Inc.
6. Westark Financial Consultants of Rogers, Inc.
7. Westark Financial Consultants of Springdale, Inc.
8. Westark Financial Consultants of Russellville, Inc.
9. Westark Financial Consultants of Fayetteville, Inc.
10. Westark Financial Consultants, Inc.
11. Cash Advance of Benton, Inc.
12. Cash Advance of North Little Rock, Inc.
13. Cash Advance of Little Rock, Inc.
14. Executive Cash Advance of Little Rock, Inc.
15. C&B Enterprises, Inc.
16. H&S Enterprises of Rogers, Inc.
17. H&S Enterprises of Fayetteville, Inc.
18. H&S Enterprises of Springdale, Inc.
19. Payday Advance of Fort Smith, Inc.

REASONS FOR DENYING THE WRIT

The sole question presented by the Petition is "[d]oes due process require the adoption and use of objective standards to gauge whether a trial court abused its discretion in approving a proposed class action settlement agreement?" On appeal to the Arkansas Supreme Court, the Petitioners challenged whether the trial court adequately enforced subpoenas against the Westark Appellees, and whether the notice to potential class members was adequate. The Respondents submit that the Arkansas Supreme Court's ruling was proper in all respects and respectfully urge this Honorable Court to deny the Petition for Writ of Certiorari. This case raises no significant issue of law that warrants this Court's review.

The Petitioners complain that the Arkansas Supreme Court adopted the standards set out in Grunin v. Int'l House of Pancakes, 513 F.2d 114 (8th Cir. 1975), but proceeded to misinterpret and misapply the standards enunciated in Grunin, resulting in a denial of due process. The Petitioners do not assert that the Grunin standards fail to provide due process protections, but they simply argue that the Arkansas Supreme Court misapplied the applicable rule of law to the facts of this case.

The Petitioners received adequate due process of law. At the fairness hearing before the trial court on June 1, 2001, the trial court heard the Intervenor's (Petitioner's) Motion to Enforce Trial Subpoenas. The Westark Respondents presented the testimony of Jeff Forsey, who testified in his capacity as the chief executive officer of fourteen (14) of the Westark Respondents and as custodian of financial documents for all nineteen (19) Westark Respondents. Jeff Forsey appeared in person at the fairness hearing and the trial court ruled that his personal appearance and production of financial records satisfied the

subpoenas, considering the short time (two days) allowed the Westark Respondents to respond to the subpoenas.

The notice to potential class members was adequate and the Petitioners received due process of law. The notice of the fairness hearing was mailed on May 16, 2001, and the fairness hearing was held on June 1, 2001. The Arkansas Supreme Court noted that courts have approved notices given to a class within a comparable time period before the fairness hearing, citing Grunin v. Int'l House of Pancakes, supra, (holding that notice sent out nineteen days before fairness hearing was not a violation of due process); Armstrong v. Board of School Directors, 616 F.2d 305 (7th Cir. 1980)(holding that notice sent out twelve days before fairness hearing was not a violation of due process). The Arkansas Supreme Court further held that the notice contained an opt-out provision which advised the class members that they could choose to opt out of the settlement and that they had until August 15, 2001, to exercise that right. In this case, class members had almost three (3) months' notice of the opt-out deadline. Additionally, the Petitioners had an opportunity to appear at the fairness hearing and they did so through counsel. Counsel for the Petitioners cross-examined the witnesses for the class representatives as well as the witness for the Respondents.

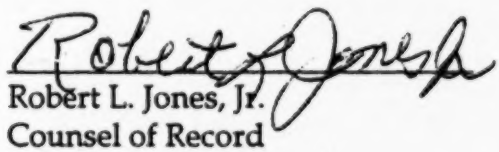
The Arkansas Supreme Court held that the mailing of individual notices to potential class members by standard mail was adequate, as such members of the class had notice of their right to opt out of the class in plenty of time. Additionally, the notice of class certification, the proposed settlement, and the opt-out date were supplemented by a notice published on May 21, 2001, in the Arkansas Democrat-Gazette, a newspaper with statewide circulation. The Arkansas Supreme Court held that the notice process comported with the minimum standards of due process.

The Arkansas Supreme Court adopted the standards from Grunin v. Int'l House of Pancakes, supra., applied that law to the facts in this case, and concluded that the trial court did not abuse its discretion in approving the class settlement. The court analyzed each issue raised on appeal according to those standards. The Petitioners received adequate due process and the Arkansas Supreme Court's holding in this case was proper in all respects. The Petition for Writ of Certiorari should be denied.

CONCLUSION

For all of the foregoing reasons, Respondent respectfully requests that this Honorable Court deny the Petition for Writ of Certiorari.

Respectfully submitted,



Robert L. Jones, Jr.
Counsel of Record

JONES, JACKSON & MOLL, PLC
401 North 7th Street
P. O. Box 2023
Fort Smith, AR 72902-2023
479-782-7203
479-782-9460 (FAX)

Mark Moll
Jay W. Kutchka
JONES, JACKSON & MOLL, PLC
401 North 7th Street
P. O. Box 2023
Fort Smith, AR 72902-2023
479-782-7203
479-782-9460 (FAX)

Attorneys for Westark
Financial Consultants
of Jonesboro, Inc., et al.

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Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ARKANSAS

PETITIONER'S REPLY BRIEF

RICHARD A. FISHER

THE FISHER LAW FIRM
1510 STUART ROAD
SUITE 210
CLEVELAND, TN 37364
TEL: (423) 479-7009

DAVID G. NIXON
Counsel of Record

THE NIXON LAW FIRM
2340 GREEN ACRES RD.
SUITE 12
FAYETTEVILLE, AR 72703
TEL: (479) 582-0020

Counsel for Petitioners

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STATEMENT OF THE CASE

Respondents Sheila Martin, et al. deny the factual allegations made by the Petitioners with respect to the financial condition of Respondent Westark and its transactions with the class, not on the basis that the allegations are untrue, but because they "are not supported by the Arkansas Supreme Court's opinion or by any document contained in the Appendix." The fact is that neither Ms. Martin *or* Westark offered any such evidence in their roles as proponents of the class action settlement agreement nor did they offer any evidence to refute that elicited by the Petitioners. In other words, the facts set forth by the Petitioners were uncontroverted and Petitioners stand by their Statement of Facts.

Moreover, Respondent Martin states she presented "the testimony of Chris Lawson, a partner at the law firm of Friday, Eldredge & Clark" in support of the settlement. The record is clear, however, that Mr. Lawson specifically stated that his testimony was limited only to the fact that he was recommending that his handful of class-member clients accept the proposed settlement and that he was not testifying to the fairness of the settlement itself.

Westark did not present the testimony of Mr. Forsey as alleged by Respondent Martin, as Westark offered no evidence whatsoever in support of the settlement agreement, but was compelled to testify by the Petitioners by subpoena. Westark did elicit some evidence from Mr. Forsey on cross-examination.

REASONS FOR GRANTING THE PETITION

I. The Arkansas Supreme Court's Decision Results in a Denial of Due Process.

The issue raised by the Petitioners is not one of mere semantics, i.e., whether this is a question of law or a question

of fact. Even Respondent Martin flip-flops in her statement of the question. Compare, "Petitioners ... argue that the Arkansas Supreme Court misapplied the applicable rule of law to the facts of this case." (Opp. Brf., p. i.) with "The Petitioners do not assert that the *Grunin v. Int'l House of Pancakes*, 513 F.2d 114 (8th Cir. 1975) standards fail to provide due process protections, but simply argue that the Arkansas Supreme Court misapplied the facts of this case to an otherwise properly stated rule of law" (Opp. Brf., p. 4) (emphasis added).

Indeed, the distinction has great significance on the development of class action due process in the State of Arkansas wherein the exercise of discretion by its trial courts is concerned. The whole purpose of the sought-after standards is to make sure that the trial court protects the rights of absent class members. *Hansberry v. Lee*, 311 U.S. 32, 42, 61 S.Ct. 115, 118, 85 L.Ed. 22, 132 A.L.R. 741 (1940). It is not enough for the Respondents to say that due process was satisfied because the Arkansas Supreme Court said so. That merely begs the question of this Court's oversight and role as final protector of rights under the U. S. Constitution.

Standards that exist in word, but not in deed, are no standards at all. The mere fact that the Petitioners prevailed below in having the Arkansas Supreme Court adopt – for the first time – objective standards against which the exercise of discretion of trial court in approving class action settlement could be judged is an empty victory if those standards are not going to be followed. If no objective standards apply, then there is nothing to tell us when discretion has been abused.

Respondent Martin asserts that the Petitioners misstate and misconstrue the Arkansas Supreme Court's ruling below as to the first standard: Comparison of the amount offered in settlement to the potential recovery. Almost every district and appellate court that has construed these standards has stated it to be the most important. Martin says the Arkansas Supreme Court's statement was that

"Petitioners' [sic] had a bona fide argument that Respondents, Martin et al., had a strong argument on the merits of their case against Westark." (Opp. Brf., p. 5.) (Emphasis added.) With respect, Respondent Martin is simply wrong. What the Court said was "Being mindful of this court's strong jurisprudence against usury as well as Article 19, section 13 of the Arkansas Constitution, we conclude that Ballard and Cain have a *bona fide* argument on the merits." (App. A at 10a.) In other words, when the Petitioners argued to the trial court that the potential recovery was in the millions of dollars because of Arkansas' constitutional usury prohibition, their argument was bona fide.

Moreover, even if Martin's interpretation were correct, it still supports Petitioners' argument that the potential recovery in the case was far, far larger than the amount offered – especially with the settlement agreement, in effect, permitted Westark to collect the settlement fund from the class members themselves, released its shareholders and sureties without any consideration, and permitted Westark to continue an obviously illegal activity.

That Westark would raise defenses of release and arbitration to class certification were of no moment since the Arkansas Supreme Court had consistently held *every* payday lender arbitration agreement unenforceable and had held that individual defenses cannot be raised to contest the procedural step of class certification. Further, Westark's reliance on *Petrovic v. Amoco*, 200 F.3d 1140 (8th Cir. 1999) (once a trial court has determined that a settlement is fair and adequate, the fact that a defendant could have paid more is not a legitimate reason to reject the settlement) is unavailing for it *presumes* an adequacy of comparison between the amount offered in settlement and the potential recovery. In other words, if a settlement offer is otherwise adequate, the fact that a defendant could pay more does not make it *in*adequate.

By the same token, the Arkansas Supreme Court's attempt to justify its departure from the first *Grunin* standard by relying on *In re Milken and Associates Securities Litigation*, 150 F.R.D. 46 (S.D.N.Y. 1993) and *City of Detroit v. Grinnell Corp.*, 356 F.Supp. 1380 (S.D.N.Y. 1972) is inappropriate. *Milken* involved settlement of a securities suit where proof of damages was problematic and subject to wildly diverse determinations. In the instant case, the calculation of damages would have been a simple, mechanical exercise of multiplying the usurious fees collected times "2". *Grinnell* involved a case where the objectors stated that the settlement should be somewhere between 3 - 7 % of total billings, *not* the potential damages, and the district court held that a settlement of 3.2 - 3.7 % of billings was "within the ball park." *Grinnell* did *not* stand for the proposition that a settlement offer of 3.2 - 3.7 % of potential judgment was adequate. With respect, the court's focus should have been on evaluating the proponents' almost total lack of evidence with regard to their burden of proof and the trial court's lack of factual findings, *not* on justifying a $ 605,000.00 settlement versus potential damages of $ 27 million.

It is also not fatal to Petitioners' cause that the trial and appellate courts not assume that all damages alleged would be collected. That issue merely goes to the subsidiary standard of examining the defendant's ability to pay. However, in the instant case parties who had substantial potential liability, who had not been sued and were contributing *nothing* to the settlement, were simply ignored! This is not a mere failure to determine facts to the Petitioners' liking... This is a fundamental, procedural failure to protect the rights of absent class members. That is, the class representative was obliged to obtain and fair and reasonable settlement of claims and the trial court was obliged to ensure that process was met once the former adversaries presented it with a proposed settlement.

If millions of dollars were illegally taken from the class members by Westark (the remedy for which is liability for

double the amount collected), the profits from which were distributed to its shareholders as dividends, bonuses or otherwise, and Westark's sureties bound themselves to indemnify the class members for any and all violations of Arkansas law (presumably including its usury laws), due process would require that those potential sources of recovery for the class *at least be considered.* However, these issues were simply ignored by the trial court and the Arkansas Supreme Court: This is not a dispute by the Petitioners with how certain facts were decided... These facts were not appropriately addressed at all.

Further, to say that the Petitioners could simply opt out if they didn't like the settlement does not address the fundamental problem that the process used determined the rights of absent class members without adequate and appropriate inquiry by the judiciary. This process is meant to provide a meaningful proxy for those who are absent in order that justice may effectively determine their rights. But if their claims are small - as they were here - they have no means to deal for themselves outside of the class context. The Petitioners have been faulted for not simply opting out, but it must be remembered that they were proceeding for the benefit of the class and were pursuing Westark, its shareholders, and sureties before this settlement raised its head. They now speak not only for themselves, but also for the thousands whose rights were determined with only a few days' notice[1] and where the proponents of the settlement agreement put on essentially no evidence addressing the *Grunin* standards. Many more flaws with the settlement were raised below, but the Petitioners are here seeking a ruling from this Court as to <u>what</u> standards should apply in such a situation and <u>how</u> they should be construed.

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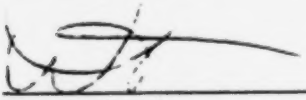
[1] With respect to the brevity of notice to class members, *Grunin's* facts are distinguishable in that the appellants had been actively involved in negotiations leading up to the settlement proposal, where here they were not. The citation to *Armstrong v. Board of School Directors*, 616 F.2d 305 (7th Cir. 1980) is inapposite since the notice was apparently never challenged on appeal.

CONCLUSION

Respondent Martin alleges that the decision of the Arkansas Supreme Court below is unique to its facts and will not affect anyone beyond its immediate litigants. To the contrary, at bottom *every* case is unique to its facts. The consideration, it is submitted, is one of degree: If proper procedures are followed to protect the weak and absent as their rights are affected and some facts are determined adversely along the way, that is one thing. But where the settlement's proponents wholly abdicate their responsibility to make a record satisfying their burden of proving the settlement is fair, reasonable and just to the absent class members and where uncontroverted evidence is introduced in opposition to that premise; where the trial court does not apply objective standards in the first instance by which to gauge the settlement; and where the appellate court does not enforce those standards based on the uncontroverted facts before it, those standards arguably don't exist at all.

Respectfully Submitted:



David G. Nixon
THE NIXON LAW FIRM
2340 Green Acres Road, Ste 12
Fayetteville, AR 72703
Tel: 479-582-0020
Fax: 479-582-0030

Counsel of Record

Richard A. Fisher, Esq.
THE FISHER LAW FIRM
1510 Stuart Road, Ste 210
Cleveland, TN 37364-0191
Tel: 423-479-7009

Attorneys for Petitioners

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